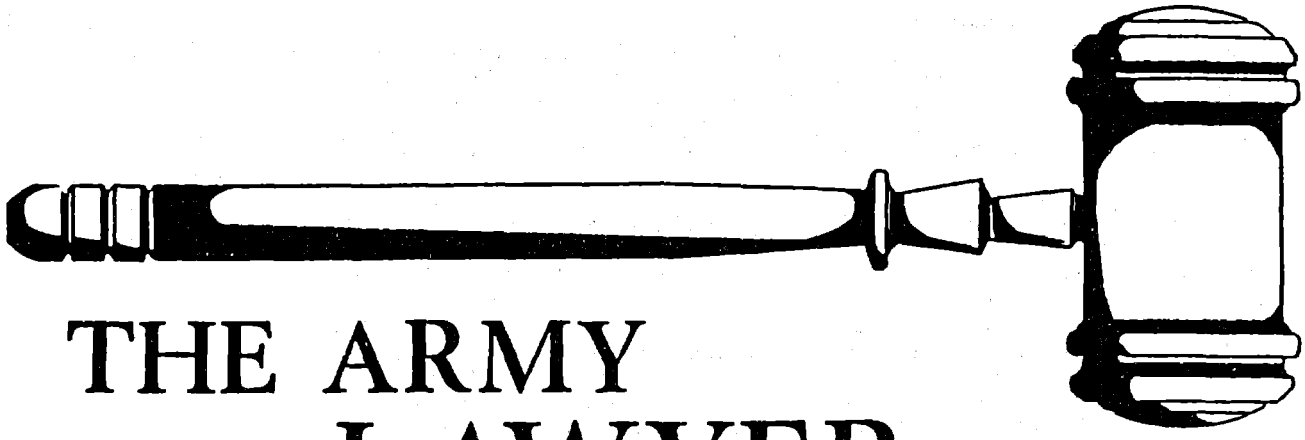

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The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?

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Introduction

As the Reagan "Revolution" began in 1980, the United States found itself besieged by the ever-increasing problem of drug abuse. Congress viewed the drug problem as a threat to American society,[1] and the President saw the drug problem as a threat to national security.[2] In time, President Reagan would characterize the fight to eradicate drug abuse as the "war on drugs."[3] The Reagan Administration's war plan involved a two-prong attack: 1) reducing domestic demand for illegal drugs through an education and prevention program, and 2) reducing the supply of illegal drugs through interdiction.[4]

The drug interdiction mission faced by federal, state, and local law enforcement personnel was enormous and one for which they were ill prepared. International drug traffickers prevailed when they engaged civilian law enforcement officials in the war on drugs. During the early 1980's, law enforcement officials estimated that they were able to interdict only about fifteen percent of the illegal drugs that traffickers were smuggling into the United States.[5] Accordingly, to increase the volume of illegal drugs interdicted and to get the upper hand in the war on drugs, the Reagan Administration decided to use the resources and capabilities available in the military to combat drug smuggling.[6]

Congress was willing to increase the military's role in the drug war but it acted cautiously. Congress indicated that "[i]n fighting this battle, it is important to maximize the degree of cooperation between the military and civilian law enforcement. At the same time, we must recognize the need to maintain the traditional balance of authority between civilians and the military."[7] Historically, Americans have abhorred military involvement in civilian affairs and have maintained a strong tradition against military intrusion in purely civilian matters.[8]

Thus, Congress faced the "American dilemma" of trying to reconcile immediate needs with traditional values.[9] That is, how could the Federal Government resolve the immediate American problem of drug abuse by increasing the military's role in drug interdiction—a role that clearly is a civilian law enforcement responsibility—without compromising the long-standing American tradition of excluding the military from civilian affairs? To extricate itself from this dilemma, Congress simply could have justified its use of the military as a temporary retreat from our long-standing tradition in the face of a national crisis.[10] The dilemma, however, persisted.

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[1]H.R. Rep. No. 71, Part II, 97th Cong., 1st Sess. 1, 3 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 1781, 1785 [hereinafter H.R. Report No. 71].

[2]Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 70 Geo. L.J. 1947 n.5 (1987) ("In April 1986, President Reagan signed a classified National Security Decision Directive (NSDD) on Narcotics and National Security ... [which] stated that international drug trafficking presented a national security threat because of its potential for destabilizing democratic government"). In 1985, Admiral James D. Watkins, then Chief of Naval Operations, suggested the drug trade was helping to finance leftist insurgencies in the hemisphere, making the trade a national security problem. *War on Drugs: A New Recruit*, Washington Post, June 21, 1985, at A22.

[3]*Portrait of the 1980's: Selections From 10 Years of History*, N.Y. Times, December 24, 1989, at 2, col. 1.

[4]*See* Note, *supra* note 2, at 1947 n.5.

[5]*See* H.R. Report No. 71, *supra* note 1, at 3.

[6]The term "military" as used in this paper refers to the Army, Navy, Air Force, and Marine Corps.

[7]H.R. Report No. 71, *supra* note 1, at 3.

[8]Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 86 (1975) (American opposition to military involvement in civilian affairs traces back to colonial times, and "the Declaration of Independence specifically enumerated the colonists' objections to military interference with their lives."); *see also* Laird v. Tatum, 408 U.S. 1, 15 (1972).

[9]The author uses the phrase "American dilemma" in this paper to denote the conflict faced by the United States in its war on drugs. On the one hand, the military offers the potential to make a certain impact in the war on drugs. On the other hand, however, a tradition of civilian and military separation restrains an extensive use of the military in the drug war.

[10]Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 129 (1960) (Congress could have viewed the national drug problem as a "desperate situation when necessity requires" the use of troops); although civilian law enforcement efforts largely have been ineffective in stemming the tide of illegal drugs flowing into this country, some analysts still view the use of the military in drug interdiction as a real threat to the tradition of civilian and military separation. *See* Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo. Wash. L. Rev. 404, 405 (1906); Note, *supra* note 2, at 1947.

The war on drugs survived the Reagan Revolution and is now a major concern of the Bush Administration.[11] From 1980 to 1990, the military's drug interdiction role steadily increased, and it probably will expand significantly during the decade of the nineties.[12] This expectation derives from three recent events: 1) a Department of Justice Office of Legal Counsel opinion that the Posse Comitatus Act[13] (PCA) does not have extraterritorial application;[14] 2) President Bush's January 25, 1990, announcement that defense spending on the war on drugs would increase to $1.2 billion in fiscal year 1991;[15] and 3) the Supreme Court's February 28, 1990, decision in *United States v. Verdugo-Urguidez*,[16] that the fourth amendment does not apply when agents of the United States search and seize property located in a foreign country and owned by a nonresident alien.

Taken together, these three events portend a vastly expanded drug interdiction role for the military. This article will examine that role by specifically addressing the issue of how far the military can go in enforcing drug laws. An analysis of the military's ability to enforce civilian laws must begin with an examination of the primary limitation Congress has placed on the military with respect to civilian law enforcement—the PCA and its amendments.[17]

The second part of this article will examine these statutory limitations to determine their effect on military drug interdiction. Because the PCA's prohibition of the military's direct participation in purely *domestic* drug law enforcement—that is, making arrests, conducting searches, and seizing property—is well settled,[18] the third part of this article will examine only the *extraterritorial* effect of the Posse Comitatus Act by reviewing judicial and administrative interpretations of the PCA. The fourth part of this article will focus on the current and future uses of the military in drug enforcement by addressing the future use of the military in drug interdiction and by examining how the PCA will affect that use.

The article concludes by asserting that the PCA does not restrict the military's direct participation in civilian law enforcement outside of United States territory. Specifically, military operations to apprehend indicted drug smugglers are legal under United States law. Regular military drug interdiction operations, however, could create foreign relations problems. For example, the recent abduction and apprehension of a Mexican doctor for his alleged involvement in the torture and murder of a United States drug enforcement agent has strained relations between the United States and Mexico.[19] Consequently, although the military's extraterritorial involvement in drug law enforcement is legal, the United States must exercise care as it employs its armed forces to fight the war on drugs.

The Posse Comitatus Act

Origins of the Act

Traditionally, Americans have strongly resisted military involvement in civilian affairs.[20] Congress based the PCA on this long-standing American tradition and enacted the PCA specifically to limit the ability of the military to enforce civilian laws.[21] The Latin term *posse*

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[11] President Bush called narcotics abuse "the nation's number one concern." *President Unveils New Drug Efforts*, N.Y. Times, Jan. 26, 1990, at 16, col. 3 [hereinafter *New Drug Efforts*].

[12] Although the military's role in drug interdiction began to expand in 1980, the Department of Defense (DOD) did not allocate any Fiscal Year (FY) 1981 funds to support the interdiction mission. In FY 1982, Congress authorized only $4.9 million, but by FY 1987 the amount authorized had increased to nearly $72.5 million. *See* Note, *supra* note 2, at 1947 n.4.

[13] 10 U.S.C. § 1385 (1982).

[14] Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Council (Nov. 3, 1989) [hereinafter OLC Memo]. This memorandum concerns the application of the PCA outside the territory of the United States. Mr. Barr interprets the PCA and its amendments as not applying to military-civilian law enforcement activities outside the United States. *See id.*

[15] *See New Drug Efforts*, *supra* note 11. The President's program proposes to devote a total of $10.6 billion to the FY 1991 antidrug effort. The administration will set aside $1.2 billion of the $10.6 billion for military use in drug interdiction. *Id.*

[16] 110 S. Ct. 1056 (1990).

[17] 10 U.S.C. § 371-80 (1982). Throughout this article, all citations to the PCA or its amendments refer to the 1982 edition of the United States Code, unless otherwise indicated. Although this article and the United States Code use the word "amendment" to refer to 1981 and 1988 legislation relating to the PCA, the legislation actually did not amend the PCA. Rather, the legislation specified exceptions to the PCA and codified existing practice.

[18] *See generally*, Furman, *supra* note 10, at 107-26; Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 Tex. Int. L.J. 291 n.48; Meeks, *supra* note 8, at 110-24; DAJA-AL 1972/4991, 18 Oct 1972 (opinion prepared for use in responding to the Chief of Police of Macon, Georgia, who was seeking to have military assistance available to him on an as-required basis). *But see Pentagon to Add Forces to Drug War*, USA TODAY, March 9, 1990, at 1A, col. 1 (reporting that Pentagon will announce plans on March 9, 1990, to add warships and aircraft to its Caribbean forces as part of President Bush's drug plan). The Pentagon plan included making Reserve military personnel available to help federal agents search thousands of cargo containers unloaded from ships sailing into United States ports. *Id.*

[19] *On Language: Keep Your Shirt On*, N.Y. Times, May 13, 1990, at 18, col. 1.

[20] *Laird*, 408 U.S. at 15.

[21] No specific constitutional provision either permits or prohibits the military from enforcing civilian laws. Several constitutional provisions, however, demonstrate the desire of the framers to control tightly a standing army. For instance, Congress has authority to raise and support armies, to declare war, and to make rules for the government and regulation of the land and naval forces. *See* U.S. Const. art. I, § 8. Additionally, the Constitution designates the President as Commander in Chief of the military. *See id.* art. 2, § 2; Note, *supra* note 2, at 1951.

comitatus[22] has its roots in the ancient Roman practice of *comitatus*,[23] which permitted government officials to have attendants who accompanied and protected them during their travels.[24] In medieval England the sheriff had the authority to call upon all males in the country over the age of fifteen to assist him in keeping the peace and capturing fugitives.[25] This civilian force became known as a *posse comitatus*,[26] and was the forerunner of the American sheriff's posse.[27]

Under authority implied from section 27 of the Judiciary Act of 1789,[28] United States marshals began to call upon the military as a *posse comitatus*.[29] The practice of using the military as a posse comitatus continued until after the Civil War, when the Federal Government often used the Army to execute Reconstruction era policies, to enforce the laws enacted by carpetbagger governments, and to influence the outcome of reconstruction elections.[30]

The southern states saw this practice of using soldiers to enforce civilian laws as abusive and repressive. The death knell sounded for the practice in the presidential election of 1876, when President Grant ordered soldiers to the polls to guard canvassers and to prevent fraud.[31] After that election, southern Democrats introduced the forerunner of the PCA as a rider to the Army appropriations bill.[32] After a great deal of debate and several changes, a joint conference committee developed a compromise version of the bill, which the President signed into law on June 18, 1878.[33]

The current language of the PCA prohibits the use of "any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws" unless expressly authorized by the Constitution or act of Congress.[34] Although the PCA does not proscribe expressly the use of the Navy and Marine Corps to enforce civilian laws, the Department of Defense has interpreted the PCA to apply to those branches of the armed forces as a matter of policy.[35]

Exceptions to the PCA

As the language of the PCA indicates, exceptions to the prohibition against using the military to enforce civilian laws may arise. Two constitutional exceptions exist; both derive from the inherent right of the United States government—through the President—to preserve public order and to carry out government operations.[36] For example, in an emergency situation the President can use the military to prevent loss of life, to prevent wanton destruction of property, and to restore governmental functions and public order.[37] The President also may use the military "to protect Federal property and Federal governmental operations when ... local authorities are unable or decline to provide adequate protection."[38]

In addition to these constitutionally-based exceptions, Congress enacted three statutory exceptions to the PCA that supplement the President's constitutional authority.[39] The President may use the military 1) to suppress insurrections when requested by the governor or legislature of a state;[40] 2) to suppress rebellions and enforce federal laws when unlawful obstructions, assemblages, or rebellions impair judicial enforcement of law;[41] and 3) to suppress domestic violence or conspiracy when it deprives citizens of constitutional rights and the state cannot or will not protect those rights.[42]

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[22] Literally, "posse comitatus" means "the power or force of the county." Black's Law Dictionary 1046 (5th ed. 1979).

[23] *See* Note, *supra* note 10, at 406.

[24] *See* Furman, *supra* note 10, at 87; Note, *supra* note 18, at 293.

[25] *See* Furman, *supra* note 10, at 87; Note, *supra* note 18, at 293.

[26] *See* Note, *supra* note 10, at 406.

[27] *See* Note, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 Tex. Tech. L. Rev. 1467, 1469 (1982).

[28] Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73.

[29] *See* Furman, *supra* note 10, at 87.

[30] *See* Note, *supra* note 18, at 294.

[31] *See* Furman, *supra* note 10, at 94.

[32] 7 Cong. Rec. 2119 (1877).

[33] *See* Furman, *supra* note 10, at 96.

[34] 18 U.S.C. § 1385 (1982). As codified, a violation of the PCA is a felony punishable by a $10,000 fine and two years imprisonment, or both. *Id.*

[35] United States v. Walden, 490 F.2d 372, 374-75 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974); 32 C.F.R. 213.10(c) (1986) (Secretary of the Navy may make exceptions to policy of Navy and Marine Corps adhering to PCA on case-by-case basis).

[36] 32 C.F.R. § 215.4(c)(1) (1986).

[37] *Id.* § 215.4(c)(1)(i). The Supreme Court in *In re* Neagle, 135 U.S. 1 (1890), held that the President had the authority to use the military in emergency situations.

[38] 32 C.F.R. § 215.4(c)(1)(ii) (1986).

[39] Congress has enacted other statutory exceptions to the PCA, but they do not supplement the President's constitutional power directly. Some of these exceptions pertain to the protection of Indian lands, National Parks, and government officials. *See* Furman, *supra* note 10, at 103.

[40] 10 U.S.C. § 331 (1982).

[41] *Id.* § 332.

[42] *Id.* § 333.

The military may engage in law enforcement while not violating the PCA in other situations as well. For instance, the Uniform Code of Military Justice (UCMJ) requires military commanders to enforce criminal laws. When a commander acts in a military law enforcement capacity by enforcing the UCMJ against a member of his or her unit, the commander's actions often will benefit civilian law enforcement activities. The Judge Advocate General of the Army has opined that a military law enforcement action that provides an incidental benefit to civilian law enforcement does not violate the PCA as long as the "primary purpose of the action is to fulfill a legitimate military requirement."[43] Authorities refer to this "primary purpose/incidental benefit" concept as the military purpose doctrine. Although the military purpose doctrine indirectly provides commanders with lawful authority to assist civilian law enforcement officials, the military generally is reluctant to justify its law enforcement role by relying on the doctrine because of the ambiguities surrounding the application of the PCA.[44]

The 1981 Amendments

To cure the reluctance of military commanders to provide assistance under the military purpose doctrine and to set forth "clear legal principles regarding effective cooperation between the military and civilian law enforcement agencies,"[45] Congress passed the 1981 amendments to the PCA. Specifically, Congress sought "to clarify the military's authority to assist civilian officials in the war on drug smuggling."[46] The 1981 amendments codified military-civilian cooperation practices that already were permissible and provided authority for the military to cooperate more with civilian law enforcement officials.[47] The amendments specifically authorized the military to provide civilian law enforcement personnel with intelligence and information,[48] facilities,[49] training and expert advice,[50] and assistance in operating and maintaining equipment provided.[51]

The 1981 amendments to the PCA also addressed specific prohibitions that circumscribed the military's law enforcement powers. For instance, Congress placed further restrictions on the extent of the military's cooperation with civilian law enforcement by prohibiting direct participation in interdiction, search, seizure, arrest, and similar activities unless otherwise authorized by law.[52] In addition, Congress prohibited the military from providing assistance to civilian law enforcement agencies if the assistance rendered would affect military preparedness adversely.[53] The amended PCA also requires the Secretary of Defense to issue regulations that permit a military department to condition its assistance to civilian law enforcement officials upon their reimbursing the Federal Government for the costs incurred by the armed service.[54]

In the final 1981 amendment to the PCA,[55] Congress sought to ensure that authorities would not construe the prohibitions in the amendments to the PCA as preempting military assistance to civilian law enforcement that other existing laws—including the original PCA—may authorize.[56] For instance, the restrictions in the 1981 amendments would not preempt the authority available under the military purpose doctrine to loan civilian law enforcement officials certain types of military property. The 1981 amendments to the PCA, therefore, apparently manifested Congress's attempt to confront the "American dilemma"[57] by balancing two competing interests: 1) promoting the effectiveness of civilian law enforcement agencies by allowing the armed forces to lend them certain military resources; and 2) controlling military involvement in civilian affairs by placing strict and specific prohibitions on certain military law enforcement activities.

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[43] Meeks, *supra* note 8, at 124-25 nn.226-31.

[44] H.R. Report No. 71, *supra* note 1, at 3.

[45] *Id.*

[46] *See* Note, *supra* note 18, at 295.

[47] *See* H.R. Report No. 71, *supra* note 1, at 7.

[48] 10 U.S.C. § 371 (1982).

[49] *Id.* § 372.

[50] *Id.* § 373.

[51] *Id.* § 374(b) (authorizing military personnel to operate equipment only to monitor and to communicate movement of air and sea traffic). If the Secretary of Defense and Attorney General determined that an emergency situation existed, section 374(c) provided limited authority for military personnel to operate military equipment outside the United States, provided: 1) military personnel operated the equipment for use as a base of operations for civilian law enforcement officials or to transport them on law enforcement operations; and 2) military personnel would not use the equipment to interdict or to interrupt the passage of vessels and aircraft. *See id.* § 374(c).

[52] *Id.* § 375.

[53] *Id.* § 376.

[54] *Id.* § 377.

[55] *Id.* § 378.

[56] U.S. Dep't of Justice, *Posse Comitatus: A New Law Lifts Ban on Military Participation in Anti-Drug Smuggling Operations*, 9 Drug Enforcement 17, 20 (Summer 1982).

[57] *See supra* note 9 and accompanying text.

DOD Implementation of the 1981 Amendments

To implement the 1981 amendments, the Department of Defense (DOD) promulgated DOD Directive 5525.5.[58] Prior to 1981, the DOD's interpretation of the PCA allowed it to exempt the Navy and Marines from the strictures of the PCA on a case-by-case basis. DOD based this interpretation on the PCA's text specifically mentioning only the Army and Air Force. Accordingly, DOD's position was that the PCA applied to the Navy and Marine Corps as a matter of DOD policy, but not as a matter of law. In implementing the 1981 amendments, DOD retained its ability to exempt the naval forces from the PCA by including a provision in DOD Directive 5525.5 that authorizes the Secretary of the Navy to exempt the naval forces in appropriate cases.[59] If the Secretary of the Navy grants an exception under that provision, the Navy or the Marine Corps may engage in direct military assistance to civilian law enforcement authorities.

Even without the Secretary's action, however, the PCA would allow the Navy to provide direct military assistance under these circumstances because the PCA itself specifically does not prohibit the Navy from providing such assistance. Likewise, the nonpreemption provision[60] of the 1981 amendments prevents the restrictions contained in the amendments from preempting the PCA and restricting the Navy. Even if, *arguendo*, the restrictions in the amendments preempted the PCA, the amendments still would permit direct military assistance if that assistance is otherwise authorized by law. The Navy, therefore, still could justify direct assistance by arguing that because the PCA specifically does not *prohibit* it from providing direct military assistance, the Navy must be otherwise authorized to provide direct assistance.

In *United States v. Roberts*[61] the Ninth Circuit examined the legality of the Navy's actions when one of its ships intercepted a civilian vessel that was smuggling drugs. The *Roberts* court held that the PCA's prohibitions, by their plain language, applied to the Army and the Air Force, but not to the Navy.[62] The court viewed the 1981 amendments to the PCA as "similar proscriptions against military involvement" rather than as amendments.[63] Accordingly, the Ninth Circuit found that the Navy violated the restrictions contained in the so-called amendments by intercepting the civilian vessel before receiving the required approval from the Secretary of the Navy.

Other courts have held that the PCA's prohibitions apply to all the services,[64] and some commentators see the DOD reservation of the authority to exempt the Navy and Marines as nothing more than a way to circumvent the strictures of the PCA.[65]

The 1988 Amendments

Seven years after Congress enacted the 1981 amendments, it once again confronted the "American dilemma," but now Congress had seven years of experience from which to draw. Since 1981, when Congress had increased the military's drug interdiction role, the wall that separated the military from civil affairs had not crumbled and the republic's foundation had not cracked. On the contrary, the military was lending a big boost to the drug interdiction effort.[66] Nevertheless, because drug

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[58] *See* 32 C.F.R. § 213 (1989) (entitled DOD Cooperation with Civilian Law Enforcement Officials). This directive reiterates that the PCA prohibits the following forms of direct assistance:

> (1) Interdiction of a vessel, vehicle, aircraft or other similar activity,
>
> (2) A search or seizure,
>
> (3) An arrest stop or frisk, or similar activity,
>
> (4) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators or interrogators.

Id. § 213.10(a)(3).

[59] *Id.* § 213.10(c).

[60] 10 U.S.C. § 378 (1982).

[61] 779 F.2d 565 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986).

[62] *Id.* at 567.

[63] *Id.* at 568.

[64] United States v. Chaparro-Almeida, 679 F.2d 423, 425 (5th Cir. 1982) (the PCA's prohibition "has been extended to all branches of the armed services"), *cert. denied*, 459 U.S. 1356 (3983); United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974) ("consideration of the legislative history of the Act and interpretative opinions reveals a policy applicable to all of the armed services").

[65] *See* Note, *supra* note 2, at 3958; Note, *supra* note 10, at 427. One writer points out that DOD could circumvent the PCA by using the Marines instead of the Army, and the Navy's air arm instead of the Air Force, to execute civilian laws. *See* Note, *supra* note 2, at 3958. While this argument has some appeal, it ignores a political reality and a primary rule of statutory construction. If Congress wanted the PCA to apply specifically to the Navy, it could have manifested that intention legislatively at any time during the 112-year existence of the PCA. Moreover, Congress could have included the Navy and Marines within the PCA when it added the Air Force in 1956. Alternatively, Congress merely could have stated that the PCA applies to the Navy during the 1981 amendment process. In addition, courts that interpret statutes must give ordinary words their ordinary meaning—that is, Army means Army, not Navy.

[66] House Conf. Rep. No. 300-456, 100th Cong., 2d Sess. 447 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2574, 2575.

abuse did not wane,[67] many people felt that the nation needed even more military assistance in drug interdiction.[68] In response to those sentiments, Congress established an air and sea surveillance mission and designated the DOD as the agency responsible for orchestrating the operations necessary to accomplish that mission.[69] Congress perceived the mission as "a major new military requirement" that would enhance the nation's drug interdiction efforts substantially. The 1988 amendments, which effectively constituted a reenactment of the 1981 amendments,[70] revised the law governing military assistance to civilian law enforcement officials.[71]

With these amendments, Congress once again expanded the military's role in drug law enforcement and attempted to grapple with the "American dilemma." Significantly, although Congress apparently remained strongly opposed to military involvement in domestic drug law enforcement, its 1988 amendments to the PCA provided the military with expanded authority in areas where the military would be operating outside the United States. Consequently, the extraterritorial application of the PCA has become a substantial area of concern to everyone involved in the war on drugs.

Extraterritorial Effect of the Posse Comitatus Act

Judicial Interpretation

In 1979 one commentator wrote that the case law concerning the extraterritorial application of the PCA was sparse and inconclusive.[72] That statement remains true eleven years later.

The first significant case concerning extraterritorial application of the PCA was *Chandler v. United States*.[73] In *Chandler* United States Army personnel arrested an American citizen in Germany shortly after World War II. The government charged Chandler with treason against the United States for making anti-American radio broadcasts from Germany during the war. The military returned Chandler to the United States, where they turned him over to civilian authorities who tried and convicted him of treason. On appeal, Chandler argued that Army personnel had arrested him in violation of the PCA. The court rejected his claim, however, and stated "it would be unwarranted to assume that such a statute was intended to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime."[74] The court also indicated in dicta that the PCA was "the type of criminal statute ... presumed to have no extraterritorial application in the absence of statutory language indicating ... [extraterritorial] intent."[75]

Two years after the *Chandler* decision, the District of Columbia Circuit faced similar issues in *Gillars v. United States*.[76] Like Chandler, a federal court convicted Gillars of treason for making propaganda broadcasts from Nazi Germany during World War II. Gillars objected to her conviction on grounds that the military unlawfully

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[67] *Id.* at 2576. "Despite substantial increases in interdiction resources, there has been little or no effect on the drug abuse problem. The cocaine smuggled into the United States doubled for 1983 to 1986—from 40-60 tons to over 130 tons." *Id.*

[68] *Id.* at 2578.

[69] *Id.* at 2576.

[70] 10 U.S.C. § 373-80 (1982).

[71] The 1988 Amendments revised the 1981 amendments in several ways. Sections 371-73 reaffirmed and broadened the military's authority with respect to providing intelligence, equipment and facilities, and training to civilians. *See* 10 U.S.C. § 371-73 (1988). Congress revised section 374 to allow military personnel to engage in aerial reconnaissance and to intercept vessels and aircraft outside of the United States for purposes of communicating with them and directing them to a location designated by civilian officials. *See id.* § 374(b)(2)(B),(C). Section 374 also deleted the requirement that the Secretary of Defense and Attorney General concur in the existence of emergency circumstances. Accordingly, the statute now allows military personnel to operate equipment "in connection with a law enforcement operation outside the United States" if the Secretary of Defense, Attorney General, and Secretary of State jointly approved the operation. *See id.* § 374(b)(2)(E).

Congress deleted from section 375 the prohibition against military personnel directly participating in interdictions, but emphasized that it did not intend this action to authorize military personnel to interrupt the passage of a vessel or aircraft except as otherwise authorized by law. *See id.* § 375. Congress also reenacted section 376, which mandates that military preparedness not suffer because of support to civilian law enforcement, with a minor change. *See id.* § 376. Congress clarified section 377, which pertains to reimbursements for military assistance, by setting forth conditions under which civilian law enforcement agencies must reimburse the branch of the armed forces that has rendered assistance. *See id.* § 377.

Congress also reenacted the provision pertaining to nonpreemption—section 378—by establishing December 1, 1981, as the effective date that preempting laws had to be in existence. *See id.* § 378. Actually, the Department of Justice has pointed out that the reenactment of section 378 "reiterate[s] that no additional restrictions on Executive Branch authority to use the military in enforcement of the laws, beyond those contained in the Posse Comitatus Act, were intended" by Congress. OLC Memo, *supra* note 14, at 24.

Section 379, pertaining to assignment of Coast Guard personnel to Navy vessels, required Coast Guard personnel to be aboard each "surface vessel that transits a drug interdiction area." *See id.* § 379. Congress also revised section 380 to emphasize that DOD had the lead role in advising civilian law enforcement officials of the types of military assistance available. *See id.* § 380.

[72] Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 St. John's L. Rev. 1, 10 (1979).

[73] 171 F.2d 921 (1st Cir. 1948).

[74] *Id.* at 936.

[75] *Id.*

[76] 182 F.2d 962 (D.C. Cir. 1950).

returned her to the United States.[77] The court followed the *Chandler* rationale and stated "the use of our Army of Occupation in Germany could not be characterized as a posse comitatus since it was the law enforcement agency in Germany at the time of appellant's arrest."[78] Because the military was not acting as a posse comitatus the court concluded that the PCA was inapplicable to the case and declined to consider its extraterritorial effect.

In *D'Aquino v. United States*,[79] another World War II treason case, a federal court convicted the defendant for engaging in propaganda broadcasts in the Pacific Theater. Like the defendants in *Chandler* and *Gillars*, D'Aquino raised a jurisdictional issue based on the military's violating the PCA. On appeal, the Ninth Circuit merely relied on *Chandler* and *Gillars* in rejecting D'Aquino's claim.[80] The court, therefore, did not have to address the issue of whether the PCA had extraterritorial effect.

Twenty years later, however, the Ninth Circuit again confronted a case in which the appellant raised the issue of whether the PCA had extraterritorial effect. In *United States v. Cotten*[81] military personnel apprehended an American civilian in Vietnam and returned him to the United States to face theft and fraud charges. Cotten argued that the military involvement in his return to the United States violated the PCA and, as a result, the court lacked jurisdiction.[82] The court rejected Cotten's argument and found that even if the military violated the PCA, jurisdiction was still proper[83] under the *Ker-Frisbie* doctrine.[84] The court, however, did not determine whether the military's action violated the PCA, and it once again bypassed the issue of whether the PCA had extraterritorial effect.

Prior to the 1981 amendments, the four cases above represented the only significant judicial efforts at interpreting the extraterritorial effect of the PCA. Not surprisingly, one authority appropriately has concluded that these cases do not resolve the question of the PCA's extraterritoriality,[85] noting that 1) the PCA was not applicable in *Chandler*, *Garris*, or *D'Aquino* "because the armed forces at the time lawfully exercised the police authority of an occupying power"; and 2) the *Cotten* court totally avoided the issue of the PCA's extraterritorial effect.[86] Consequently, the debate over the PCA's application outside United States territory remained unresolved after these cases.

After the 1981 amendments, the courts had additional opportunities to interpret the PCA's extraterritorial effect. *United States v. Roberts* was one of the early post-amendment cases involving the extraterritorial issue.[87] Because the facts of *Roberts* involved the Navy's interdiction of a ship smuggling drugs outside United States territory in the Pacific Ocean, the extraterritorial issue technically was before the court.[88] The court once again avoided the larger issue of extraterritoriality, however, and held that the PCA did not by its plain language apply to the Navy.[89] Accordingly, another opportunity passed without a judicial interpretation of the PCA's extraterritorial coverage in a clear and unambiguous manner. Therefore, an examination of existing *administrative* interpretations of the PCA is essential to an analysis of its extraterritorial application.[90]

Administrative Interpretation by the Military Departments

Prior to the *Chandler* court's holding that the PCA did not apply to the Army of Occupation in postwar Germany, The Judge Advocate General of the Army interpreted the PCA to have worldwide application.[91] Opinions issued after the *Chandler* decision have permitted military personnel overseas to assist stateside civilian law enforcement personnel with "deportations, criminal identification, administration of lie-detector tests, and

[77] *Id.* at 972.

[78] *Id.*

[79] 192 F.2d 338 (9th Cir. 1951).

[80] *Id.* at 351.

[81] 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973).

[82] *Id.* at 749.

[83] *Id.* at 747.

[84] Ker v. Illinois, 119 U.S. 436 (1886) (state court jurisdiction not loss when authorities forcibly abduct and return defendant to United States); Frisbie v. Collins, 342 U.S. 519 (1952) (state court jurisdiction not defeated when defendant forcibly abducted even though authorities may have violated federal kidnapping law). "The *Ker* and *Frisbie* cases establish a powerful rule that forcible abduction neither offends due process nor requires a court to free a suspect seized in violation of international law." Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 Tex. Int'l L.J. 1, 47 (1986).

[85] Siemer & Effron, *supra* note 72, at 10.

[86] *Id.*

[87] *See supra* notes 61-63 and accompanying text. Two years before *Roberts*, the court in United States v. Del Prado-Montero, 740 F.2d 113 (1st Cir.), *cert. denied*, 469 U.S. 1042 (1984), had an opportunity to rule on the PCA's extraterritorial application, but simply decided that the Navy did not violate the PCA by assisting the Coast Guard in its law enforcement activities. *Id.* at 116.

[88] *Roberts*, 779 F.2d at 566.

[89] *Id.* at 567.

[90] Courts often give due deference to an agency's administrative interpretation of its regulations. *See* Siemer & Effron, *supra* note 72, at 10 n.38.

[91] *See* Furman, *supra* note 10, at 107.

interviews of suspects."[92] In one case, however, the Judge Advocate General of the Air Force gave the PCA extraterritorial application when he opined that Air Force personnel would violate the PCA by serving a state notice of citation on an airman stationed overseas.[93] This inconsistent extraterritorial application of the PCA clouds the issue of extraterritorial effect.

Administrative Interpretation by the Department of Justice

The Department of Justice has issued a number of formal opinions interpreting the PCA,[94] but has yet to issue a formal opinion concerning the extraterritorial effect of the PCA.[95] The Office of Legal Counsel, however, recently has opined that the PCA has no extraterritorial effect.[96] It based its conclusion on seven factors: 1) the "strongly domestic orientation" of the PCA's text; 2) an analysis of the PCA's legislative history; 3) the general presumption against extraterritorial application of criminal statutes; 4) the possible infringement on the President's inherent constitutional powers to execute the laws and to conduct foreign policy if the Federal Government applied the PCA extraterritorially; 5) the judicial, administrative, and scholarly interpretations of the PCA's extraterritorial effect; 6) an analysis of the 1981 and 1988 amendments; and 7) an analysis of DOD regulations.

To date, this opinion is the most definitive interpretation of the PCA's extraterritorial application. Until the judiciary provides a more definitive interpretation, the Office of Legal Counsel's opinion will continue to be the only substantial authority for expanded military participation in drug interdiction outside the United States. Even with this authority, however, the problem of defining the permissible scope of military participation in the drug war outside the United States persists.

Current and Future Use of the Military in Drug Enforcement

When Congress amended the PCA in 1981—and first expanded military participation in the war on drugs—the civilian law enforcement effort became more effective.[97] With state of the art military equipment available to them, civilian law enforcement officials were now capable of actually waging a war on drugs. The military assistance provided ranged from gathering intelligence on foreign drug trafficking to destroying drug processing labs in foreign jungles and intercepting drug laden ships on the high seas.[98] Military assistance provided thus far has had a definite impact in the war on drugs; the level of assistance, however, has not been powerful enough to deliver the decisive blow necessary to eliminate drug trafficking. Accordingly, with some analysts calling for even greater military involvement in the war on drugs, government officials still must answer the question: just how far *can* the military go in assisting civilians in the drug war? More specifically, does the PCA permit the Federal Government to increase the level of direct military participation in arrests, searches, and seizures? Are future military operations to apprehend indicted drug smugglers possible and permissible?

As this article discussed earlier,[99] one of the provisions of the PCA amendments restricts direct military participation in arrests, searches, and seizures.[100] That provision, however, has no extraterritorial effect because it cannot preempt the PCA and the PCA itself has no extraterritorial application. Therefore, because the PCA does not apply outside the United States, the military should be able to engage in police functions outside United States territory.

The Office of Legal Counsel, Department of Justice, also advances the view that the PCA and its amendments, taken together, permit the military to engage in law enforcement functions outside of the United States.[101] In the opinion of the Office of the Legal Counsel, military involvement in the drug war "could include direct military participation in law enforcement activities such as the apprehension of persons under indictment who are outside the territorial jurisdiction of the United States, or assistance in interdiction efforts on the high seas."[102] An example of this broad police authority is the recent

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[92] *See* Siemer & Effron, *supra* note 72, at 12; Furman, *supra* note 10, at 108 n.140 (citing JAGA 1954/5140, 10 June 1954 (identification of soldier stationed in Korea); JAGA 1954/6516, 29 July 1954 (administering polygraph to soldier stationed in Europe and accused of violating state law); JAGA 1957/2176, 6 Mar. 1957 (taking statement of soldier stationed in Germany for state police)).

[93] *See* Siemer & Effron, *supra* note 72, at 12.

[94] *Id.* at 13 n.45.

[95] *Id.*

[96] *See* OLC Memo, *supra* note 14, at 27.

[97] *See* Note, *supra* note 10, at 419.

[98] Note, *supra* note 18, at 308.

[99] *See supra* notes 58-60 and accompanying text.

[100] 10 U.S.C. § 375 (1988).

[101] *See* OLC Memo, *supra* note 14, at 24 ("Since the Posse Comitatus Act does not apply extraterritorially, we conclude that there are no statutory limits on the Executive Branch's authority to employ the military in law enforcement missions outside the territorial jurisdiction of the United States"). *Id.*

[102] *Id.* at 23. A discussion of the international law issues and foreign policy ramifications involved in direct military action are beyond the scope of this paper. See Findlay, *supra* note 84, for a discussion of these issues.

apprehension of General Manuel Noriega during "Operation Just Cause" in Panama.[103]

Although apprehension of General Noriega was not the sole reason for the military operation, the General's apprehension was one of the objectives of the operation.[104] General Noriega, whom a United States grand jury indicted on federal drug charges, sought refuge in the Vatican Embassy in Panama a few days after the operation began. United States soldiers then surrounded the embassy until General Noriega surrendered to military personnel on January 4, 1990.[105] Based on the military's involvement in General Noriega's apprehension, his lawyers forseeably could argue that the PCA has extraterritorial application and that the military violated the PCA when it apprehended General Noriega.[106] This argument may give the courts yet another opportunity to address directly the issue of the PCA's extraterritorial application.

Based on the *Chandler* line of cases, the Office of the Legal Counsel's opinion, and the other factors discussed in this paper bearing on extraterritorial application of the PCA, courts likely will not hold that the PCA applies outside the United States. Finding no PCA violation, a court probably would then review the apprehension under the *Ker-Frisbie* doctrine,[107] which states that "[a]s long as United States agents avoid using brutal or egregious tactics to apprehend suspects, courts will not inquire into the means of arrest before asserting in personam jurisdiction over abducted terrorists."[108] Given today's drug war environment, a court certainly would not inquire into the means of arrest before asserting in personam jurisdiction over abducted international drug kingpins either.

The recent Supreme Court decision in *United States v. Verdugo-Urguidez* may expand the military drug interdiction role outside the United States further. In *Verdugo-Urguidez* federal narcotics agents suspected that a Mexican citizen residing in Mexico was directing an organization that was smuggling drugs into the United States. Federal authorities charged the defendant with violating several drug-related offenses, and they obtained a warrant for his arrest. Mexican police officers apprehended the defendant in Mexico and transported him to a United States Border Patrol Station. After the defendant was in custody, a Special Agent with the United States Drug Enforcement Administration coordinated with Mexican officials to search the defendant's Mexican residence.

Officials then made a search of the defendant's residence without obtaining a warrant from a United States court. At trial the defendant predictably moved to suppress evidence seized during the search. The Supreme Court held that the fourth amendment did not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country.[109] In rejecting the Court of Appeals' extraterritorial application of the fourth amendment, the Supreme Court stated:

> [t]he Court of Appeals' rule would have significant and deleterious consequences for the United States in conducting activities beyond its borders. The rule would apply not only to law enforcement operations abroad, but also to other foreign operations—such as *armed forces action—which might result in "searches and seizures."*[110]

The Supreme Court's example of the military performing police functions such as searches and seizures is interesting. The language the *Verdugo-Urguidez* Court used may indicate that the Supreme Court does not view the PCA or its amendments as having any effect outside the United States.

The clear implication of the *Verdugo-Urguidez* decision is that military personnel, as agents of the United States, do not need a warrant to search or seize property located outside the United States and owned by an indicted nonresident alien. The Court's closing comment summarizes just how far the military can go in the war on drugs:

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[103] *Noriega's Surrender*, N.Y. Times, Jan. 4, 1990, at 12, col. 5. On 20 December 1989, President Bush ordered United States troops to execute "Operation Just Cause," a military operation involving over 20,000 military personnel in Panama. *Id.*

[104] *Id.* The stated objectives of Operation Just Cause were to safeguard the lives of American citizens, to help restore democracy in Panama, to protect the integrity of the Panama Canal Treaties, and to bring General Noriega to justice. *See id.*

[105] *See Noriega Surrenders to U.S. Authorities*, Wash. Post, Jan. 4, 1990, at A1.

[106] Arguably, apprehensions, searches, and seizures in violation of the PCA could result in the suppression of evidence in a criminal trial as "fruit of the poisonous tree." *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963).

[107] *See supra* note 84 and accompanying text.

[108] Findlay, *supra* note 84, at 51.

[109] *Verdugo-Urguidez*, 110 S. Ct. at 1056.

[110] *Id.* (emphasis added).

> Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty or legislation.[111]

Conclusion

Military operations conducted outside of the United States are beyond the reach of the PCA. The President's constitutional powers to conduct foreign policy allow him to use the military to assist civilian enforcement of United States drug laws. Military assistance may range from providing intelligence on drug trafficking to conducting military operations whose objectives are the apprehensions of individuals located outside this country and indicted for, or charged with, drug offenses under United States law. Under the *Ker-Frisbie* doctrine, military apprehension of an international drug smuggler will not defeat jurisdiction, as long as the apprehension was not the product of brutality or egregious conduct. Furthermore, the *Verdugo-Urguidez* case clearly holds that evidence seized by the military from nonresident aliens outside the United States is beyond the scope of the fourth amendment.

Outside the United States, the military can provide a broad range of support to civilian law enforcement officials in the war on drugs without violating United States law. As the Supreme Court pointed out in *Verdugo-Urguidez*, military support of extraterritorial police activities depends substantially on "the view of the political branches of our Government."[112] Accordingly, as a manifestation of domestic policy and politics, military support in the area of enforcing domestic laws outside of the United States may create foreign policy or international law problems.[113] For example, the increased United States military presence along our southwestern border to assist in drug interdiction has caused the Mexican government some concern.[114] In addition, when the United States unilaterally proposed positioning naval vessels off the coast of Columbia for surveillance and interdiction purposes, the Columbian government vigorously objected.[115] Accordingly, federal officials must consider foreign policy and international law concerns[116] as the military's role in the drug war continues its expansion—an expansion that, under the Posse Comitatus Act and its amendments, would most certainly be lawful.

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[111] *Id.*

[112] *Id.*

[113] *Sovereignty Hinders U.S.-Mexican Drug Alliance*, N.Y. Times, Feb. 25, 1990, at 18, col. 1. "The Mexican Government, acting through its embassy in Washington, expressed strong reservations about growing American military activity along the borders." *Id.*

[114] *Id.*

[115] *Two U.S. Warships Sailing to Columbia for Drug Patrol*, L.A. Times, Jan. 7, 1990, at 1, col. 5.

[116] *See* Findlay, *supra* note 84, at 52.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Is the Army's Urinalysis Program Constitutional Under the Fourth Amendment in Light of *von Raab* and *Skinner*?: The Defense Perspective

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> Freedom under law is like the air we breath. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dreaded knock on the door in the middle of the night....[1]

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[1] "United States Law Day" address by President Dwight D. Eisenhower (May 1, 1958), *quoted in* Time, May 5, 1958, at 11.

The prevention of illegal drug use has become a matter of great national concern. The armed forces are not immune from this drug epidemic. In an attempt to respond to the widespread use of illegal drugs, the military and other government entities have instituted programs that call for periodic urinalysis testing. This article will address the Army's drug testing program and compare it to civilian testing programs used by federal agencies, specifically the Federal Railroad Administration, whose drug testing program was challenged in *Skinner v. Railway Labor Executives' Association*,[2] and the United States Customs Service Agency, whose drug testing program was challenged in *National Treasury Employees Union v. von Raab*.[3] This article will argue that the Army's program can no longer withstand constitutional scrutiny in light of the language in *von Raab* and *Skinner* limiting suspicionless drug tests to situations in which a fourth amendment intrusion serves a special government need beyond the normal need for law enforcement. This article also will argue that the administrative purposes cited by the Army are merely pretexts to enable law enforcement personnel to gather evidence to be used in criminal proceedings. Before addressing the reasonableness of the Army's urinalysis inspections, an examination of the administrative inspection exceptions to the probable cause and search warrant requirements of the fourth amendment is appropriate.

Administrative Searches

The Supreme Court has vacillated on when it will allow administrative searches to be authorized by statute without requiring a warrant.[4] The Court, however, consistently has allowed warrantless searches in the cases of persons who work in an industry in which a history of strict government oversight has existed.[5] Therefore, a regulatory scheme that is detailed, specific, and regular in its application will substitute for a warrant and allow reasonable inspections of the commercial premises of such businesses.[6] These inspections are deemed to be administrative in nature and are designed to enforce specific statutory or regulatory goals.

In *Burger v. New York* the Supreme Court sanctioned the warrantless inspection of a New York City junkyard pursuant to an administrative scheme regulating the junkyard industry and authorizing such searches.[7] Originally, the New York Court of Appeals struck down the New York statute as violative of the fourth amendment because, in its view, the statute had no truly administrative purpose but was designed as a pretext to uncover evidence of criminality.[8]

The Supreme Court, however, while noting that a state can address a social problem by way of an administrative scheme and penal sanctions, stressed that administrative statutes have different subsidiary purposes than penal laws, and warrantless inspections authorized by such statutes are designed to ensure compliance with the administrative goals.[9] The Supreme Court found that the regulatory scheme at issue in *Burger* contained a plain regulatory purpose and, therefore, was not constitutionally infirm merely because evidence of criminal activity was discovered as a result of the administrative search.

Although the Army's urinalysis program asserts an administrative purpose, the frequent and consistent use of test results as evidence in criminal prosecutions distinguishes it from the regulated industry exception to the warrant requirement. The consistency of use of test results in criminal prosecutions demonstrates that obtaining evidence of criminality is not merely incidental to the inspection; rather, the urinalysis inspection acts as a pretext for a search for criminal evidence.

The Army's Urinalysis Program

The Army's program, as specified in Army Regulation 600-85[10] (AR 600-85), allows for command-directed testing of a soldier's urine in several situations. The

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[2] 109 S. Ct. 1402 (1989) (*Skinner* and *von Raab* were decided on the same day by the Supreme Court and represent the first time the Court has spoken on the constitutionality of drug testing in the workplace).

[3] 109 S. Ct. 1384 (1989).

[4] *Compare* Frank v. Maryland, 359 U.S. 360 (1959) (approving nonconsensual inspections of private dwelling without a search warrant) *with* Camera v. Municipal Court, 387 U.S. 523 (1967) (overruling *Frank*) *and* Wyman v. James, 400 U.S. 309 (1971) (allowing warrantless inspections of person's receiving Aid to Families with Dependent Children, stating that such intrusions were not intrusions in fourth amendment terms because their purpose was rehabilitative and that, even if the case worker's visit was considered a search, it was "reasonable" because it was not a search for criminal evidence).

[5] *See, e.g.*, Burger v. New York, 482 U.S. 691 (1987) (warrantless search of junkyard under New York statute valid); Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless inspections of mining facilities required by Mine Safety and Health Act, 30 U.S.C. § 801-78 (1982) valid).

[6] *See Burger*, 482 U.S. 691 (establishing that a warrantless administrative search of a pervasively regulated industry is reasonable if: 1) a substantial state interest behind the regulatory scheme exists; 2) the search is necessary to further that scheme; and 3) the authorizing statute is an adequate substitute for the warrant in giving notice to owners and limiting the discretion of those conducting the search).

[7] *Id.* at 708.

[8] *Id.* at 712.

[9] *Id.* (finding that the state had a substantial interest in regulating the vehicle-dismounting and automobile junkyard industry because motor vehicle theft had increased in the state and these thefts were associated with the industry).

[10] Army Reg. 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

commander may direct a urinalysis as a method of determining a soldier's fitness for duty when the commander has a reasonable belief that a soldier is using a controlled substance. The commander also may direct a urinalysis as part of a unit inspection.[11] Evidence obtained from a valid inspection may be admitted at a criminal prosecution of an offender. The commander needs neither probable cause nor reasonable suspicion of drug use to conduct an inspection. Additionally, unlike the urinalysis programs approved by the Supreme Court in *Skinner* and *von Raab*, as well as civilian programs sanctioned in several lower court cases,[12] soldiers are given no specific prior notice of the urinalysis. Therefore, although these tests must be "reasonable,"[13] no other systemic limitations on a commander's discretion to direct urinalysis testing exist except the capability of the installation and the laboratory to process and test the urine samples. Moreover, the commander, subsequent to the inspection, receives all of the results and determines what action is needed, including whether charges should be preferred against an individual who tests positive.

The objectives of the Army's urinalysis program, as outlined in AR 600-85, are: 1) early identification of drug and alcohol abuse; 2) deterrence of drug abuse; 3) rehabilitation of both military and civilian employee alcohol and drug abusers as soon as possible; 4) monitoring the rehabilitation progress for those who require testing as part of their rehabilitation plan; and 5) development of data on the prevalence of alcohol and drug abuse within the Army. These objectives, although laudable, come at a high price. To detect the limited number of soldiers who use drugs, the Army must subject thousands of non-drug-using soldiers to an intrusion into a very private bodily function. The excretory function is one "traditionally shielded by great privacy."[14] As the Court of Appeals for the Fifth Circuit stated in its decision in *von Raab*:

> [t]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[15]

The fourth amendment protections against unreasonable searches and seizures by the government have, with some limitations, consistently been held to shield American soldiers.[16] Along with detecting drug use, however, urinalysis also could disclose a myriad of private facts about a soldier. Additionally, the Supreme Court has established that individuals retain an expectation of privacy and a right to be free from government intrusion in the integrity of their bodies.[17] Accordingly, the Supreme Court in *Skinner* and *von Raab* recognized that the taking of urine is a search under the fourth amendment. Nevertheless, inspections under Military Rule of Evidence 313(b)—inspections that now include orders for the production of bodily fluids—traditionally have been viewed as reasonable, despite their lack of conformity with the warrant requirement of the fourth amendment. This view has been based upon the need to guard against factors

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[11] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313:

> Inspections and inventories in the armed forces.
>
> (a) General Rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.
>
> (b) Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation ... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, or installation.... An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty.... An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

[12] *See* Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989); Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Nev. 1987).

[13] United States v. Mitchell, 16 M.J. 654 (N.M.C.M.R. 1983); *see* Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

[14] *Skinner*, 109 S. Ct. at 1418.

[15] National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987).

[16] *See* United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

[17] United States v. Ramsey, 431 U.S. 606 (1978); Schmerber v. California, 384 U.S. 757 (1966).

that would "affect adversely the security, military fitness, or good order and discipline of the command."[18] Such inspections have been experienced by generations of Americans serving in the armed forces. "Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and his personal and professional belongings."[19] The Court of Military Appeals often has noted that inspections are part of the "disciplinary cost" to be paid by a soldier to shoulder his "readiness" burden.[20]

Currently, however, the increased concern about the adverse effect of drug abuse on the military, coupled with the availability of vastly improved testing technology, has shifted the focus of military inspections from whether the barracks are sanitary and orderly and whether the soldiers' gear is in satisfactory shape, to whether illegal substances are present in the unit and its soldiers' bodies. These special drug inspections, used solely to ferret out evidence of illegal drug use, are not analogous to the Army's traditional preparedness inspections.[21]

Additionally, despite the rehabilitative and preventive goals of the Army's drug testing program, this program is being used as a tool to gather evidence for subsequent prosecutions under the Uniform Code of Military Justice. The Army Court of Military Review has stated that the use of the word "primary" in the language of Military Rule of Evidence 313(b) demonstrates its dual administrative and criminal purpose. The court, however, also stated that no purpose is automatically primary when several purposes are involved.[22] Searches of bodily fluids, including searches that are labeled inspections under Military Rule of Evidence 313(b), consistently have resulted in prosecutions throughout the Army, even for first-time offenders.[23]

The Army Court of Military Review recently upheld a conviction for obstruction of justice when a soldier submitted toilet bowl water instead of urine.[24] In that case, the court supported its holding by defining the urinalysis program as a criminal proceeding.[25] This definition, however, clearly is inconsistent with the Army's definition of the urinalysis program as an administrative inspection under Military Rule of Evidence 313(b). The decision to prosecute service members whose urine tests positive merely provides an expedient means of ridding the Army of soldiers who have used drugs. This use of urinalysis test results in criminal actions sets the Army's drug identification program apart from other urinalysis programs.

Previous Challenges to the Army's Program

In *Committee for G.I. Rights v. Callaway,*[26] a 1974 class action suit, the Army's urinalysis program was challenged in the United States District Court for the District of Columbia. The district court found that the Army's program exhibited "serious constitutional infirmities when measured against established civilian standards."[27] The court held that the warrantless drug inspections without probable cause were not justified by military necessity and that the use of the information gained by these searches as a basis for imposing punitive sanctions—including less than honorable discharges—violated soldiers' rights under the fourth amendment.[28] The district court allowed the Army to conduct drug inspections without probable cause if the results were not used in punitive actions. The Army appealed the district court's decision. The Court of Appeals for the District of Columbia Circuit reversed the district court's decision holding that the different character of the military

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[18] Generally, searches conducted without the scrutiny of the judicial process—that is, absent approval by a neutral magistrate—are per se unreasonable, subject to a few well-established exceptions. *See* Katz v. United States, 389 U.S. 347, 357 (1967); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

[19] *Middleton*, 10 M.J. at 127.

[20] United States v. Wetzel, 7 M.J. 95, 99 (C.M.A. 1979) (Fletcher, C.J., concurring); *see also* United States v. Fagan, 28 M.J. 64 (C.M.A. 1989); *Unger*, 27 M.J. at 349; Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); *Middleton*, 10 M.J. at 123.

[21] *Compare* United States v. Grace, 42 C.M.R. 11 (C.M.A. 1970) (drugs discovered in a valid locker inspection may be used in criminal prosecution) *with* United States v. Lange, 35 C.M.R. 458 (C.M.A. 1965) (distinguishing a search requiring probable cause from a valid shakedown inspection).

[22] United States v. Rodriquez, 23 M.J. 896, 899 (A.C.M.R. 1987).

[23] Figures available to the Army Defense Appellate Division for 1989 show 125 cases involving drug violations. Of these 125 cases, 70 included prosecutions for illegal drug use, the evidence for which was obtained from a random unit urinalysis test.

[24] United States v. Turner, 30 M.J. 984 (A.C.M.R. 1990).

[25] *Id.* at 985 (quoting United States v. Gray, 28 M.J. 858, 861 (A.C.M.R. 1989)).

[26] Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (1974), *rev'd*, 518 F.2d 466 (D.C. Cir 1975) (the class contained all soldiers in the United States Army European Command with ranks of private through sergeant who were subject to the urinalysis program).

[27] *Id.* at 939 (noting that drug inspections are not analogous to the Army's traditional preparedness inspections).

[28] In response to the Army's argument that the special needs of the military mandate random drug testing, the court opined: "The doctrine of military necessity does not embrace everything the military may consider desirable. One does not automatically forfeit the protections of the Constitution when he enters military service." *Id.* at 940.

mission required a different application of the fourth amendment protections.[29]

Similarly, in *Murray v. Haldeman*[30] the Court of Military Appeals, relying on the Court of Appeals decision in *Committee for G.I. Rights*, held that the military's urinalysis program was reasonable in light of the unique conditions that exist in the military.[31]

Although these cases apparently justify the Army's urinalysis program based on military necessity, they fail to address the fact that urinalysis cases routinely are prosecuted. *Skinner* and *von Raab*, however, clearly call into question the constitutionality of the use of urinalysis results in criminal prosecutions.

Skinner and *von Raab*

Various federal agencies have implemented programs allowing for the testing of employees' urine as part of the Mandatory Federal Workplace Drug Testing Program.[32] The purpose of these programs is to ensure a drug-free workplace, because drugs are viewed as leading to lower productivity, less employee reliability, and greater absenteeism. The regulation provides specific guidelines for testing. In particular, when a positive test result is obtained, the employee may enter counseling; or, if counseling is refused, the agency may initiate an action to remove that employee from civil service.[33] In addition, urine tests may not be used as evidence in criminal proceedings, and agencies are not required to report to the Attorney General the results of the tests.[34]

In *Skinner* the Supreme Court upheld a Federal Railroad Administration (FRA) regulation authorizing mandatory urine testing for employees involved in certain accidents and for employees violating certain safety rules.[35] The Court compared the government's interest in regulating the behavior of railroad employees to ensure safety to the government's supervision of regulated industries. The *Skinner* Court noted that when a situation involving "special needs" beyond the needs of normal law enforcement existed, those "special needs" could justify departures from the usual fourth amendment requirement for probable cause and a warrant for search.[36] The Court also stated that the FRA promulgated these regulations, not to assist in the prosecution of employees, but rather to serve the "special need" of preventing railroad accidents that result from impairment of employees by alcohol and drugs.[37] The Court specifically noted that it would leave for another day the "question whether the routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the Agency's program."[38]

Similarly, in *von Raab* the Supreme Court upheld a regulation requiring employees of the United States Customs Service applying for positions involving interdiction of illegal drugs or use of firearms to provide urine samples.[39] The Court reasoned, as it did in *Skinner*, that when the fourth amendment intrusion serves needs beyond the normal need for law enforcement, balancing individualized privacy expectations against government interests is necessary to determine whether requiring a warrant or individualized suspicion is impracticable.[40]

The Customs Service program is not mandatory for all Customs Service employees, but is, in effect, voluntary, because urinalysis is required only of those people who choose to apply for positions involving interdiction of illegal drugs or use of firearms. Additionally, employees

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[29] The court conducted a balancing test and found the Army's drug testing reasonable based upon the increase in drug use in the military that poses a substantial threat to readiness; the different in the expectation of privacy in the military; the primary purpose of the program, which is to ferret out illegal drugs as a means of protecting the health of a unit; the fact that punitive actions were merely incidental; and the Army's attempt to guard the dignity and privacy of the soldier during testing. *Committee for G.I. Rights*, 518 F.2d at 466.

[30] 16 M.J. 74 (C.M.A. 1983).

[31] The *Murray* court noted, however, that a urinalysis could not be categorized as a military inspection under Military Rule of Evidence 313, and treated it instead as an otherwise valid search under Rule 314(k). Rule 313 has been amended since *Murray* specifically to include an order to produce bodily fluids. Therefore, the government must bear the burden of proving by clear and convincing evidence that the urinalysis is an inspection within the meaning of the rule and not solely a search for evidence. *See* Mil. R. Evid. 313 analysis, App. 22 at A22-22.

[32] *See* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986); Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,979 (1988).

[33] Exec. Order No. 12,564 § 5(d)(1).

[34] Exec. Order No. 12,564 § 6(h) (the test results may be used in an administrative action against an employee; however, preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis or unless the employee confirms the accuracy of the initial test by admitting to drug use).

[35] *Skinner*, 109 S. Ct. at 1416.

[36] *Id.* at 1414.

[37] *Id.* at 1415.

[38] *Id.* at 1415 n.5.

[39] *von Raab*, 109 S. Ct. at 1390.

[40] *Id.*

who apply for these positions are on advance notice that a urine sample will be required. When the employee gives the urine sample, he or she is sheltered from the view of the monitor.[41] Although employees who test positive are subject to dismissal from the Customs Service, the test results may not be turned over to any other agency—including criminal prosecutors—without the employee's written consent.[42]

In comparison, the Army requires periodic, mandatory urinalysis of all soldiers—including soldiers in non-sensitive, non-combat positions.[43] The Army conducts its urinalysis testing without specific notice, and commanders can test at any hour of the day or night. Additionally, AR 600-85 requires that the soldier must be viewed by the monitor while the soldier urinates.[44] Soldiers are not, as a routine part of the program, given the opportunity to question positive test results. Arguably, the procedures set forth in AR 600-85 are exacting for the specific purpose of ensuring that urinalysis results will be admissible at criminal proceedings. The most important constitutional distinction between the Army's urinalysis program and that of civilian entities, however, is that the positive results of urinalysis testing are always turned over to the commander, who then has the power to prefer criminal charges against an individual—charges that are, with recurring frequency, brought to trial. Furthermore, the Army's program is the only program in which test results regularly are referred to law enforcement personnel. Obviously, therefore, "another day" has arrived, and the Supreme Court must consider whether this routine use in criminal prosecutions makes the Army's program constitutionally infirm.

Cases Relying on *Skinner* and *von Raab*

Since the *von Raab* and *Skinner* decisions, district and circuit courts have been applying these decisions to various federal drug testing programs. Several courts have upheld drug testing programs.[45] As noted in *Hartness v. Bush*,[46] however, the cases that have upheld drug testing programs are bound factually. As *Hartness* court noted, the Supreme Court in *Skinner* placed heavy emphasis on the many railway accidents shown to be related to illegal drug use to justify the testing plan, and in *von Raab* it relied on the fact that the customs officials were front-line armed officials.[47] The district court in *Hartness* described the *Skinner* and *von Raab* decisions as granting the government a narrow license in an isolated factual circumstance.[48] The *Hartness* court did not believe the situations in *von Raab* and *Skinner* would allow the broad-based random testing of unarmed employees that were slated for testing by the General Services Administration and the Executive Office of the President.[49] Similarly, in *Taylor v. O'Grady*,[50] the Court of Appeals for the Seventh Circuit held that the government's interest in the integrity of its work force was not great enough to justify a mandatory annual urinalysis for corrections officers who had no access to inmate populations, no reasonable opportunity to smuggle drugs to inmates, and no access to firearms.[51] The *Taylor* court did, however, uphold the testing of corrections officers who had contact with prisoners and opportunities to smuggle drugs to them. That aspect of the program, however, included safeguards designed to minimize error and stigma for officers who tested positive.[52]

Clearly, these cases demonstrate that drug testing will never be authorized across-the-board in the federal civilian workplace and that any program will have to be justified by a "special need" beyond the need for law enforcement. The Army's program is the only program—other than, of course, other military testing programs—that authorizes testing for all of its employees, with no "special need" distinctions based on whether a soldier is a member of a combat unit or based on the specific task that the soldier performs. For example, testing of a helicopter pilot, based on the need to ensure safety, would certainly seem more reasonable than testing of a clerk-typist, even in light of the military's policy that all soldiers be fit and ready for combat. Additionally, unlike the program discussed in the *Taylor* case, no safeguards are

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[41] *Id.* at 1388.

[42] *Id.* at 1389.

[43] A soldier refusing to produce a urine sample may be punished for disobeying an order. *See* Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1988).

[44] *Compare* Exec. Order No. 12,564 § 4(c), Fed. Reg. 32,889 (1986) (allowing individual privacy during urine collection "unless the governmental agency has reason to believe that a particular individual may alter or substitute the specimen to be provided") *with Unger*, 27 M.J. at 349 (holding that for a female in the Navy to disrobe from the waist down, sit on a toilet, and urinate while being observed from a distance of approximately 18 inches was reasonable).

[45] *See, e.g.*, Transport Workers Union v. Southeast Pa. Transp. Auth., 884 F.2d 709 (3d Cir. 1988) (testing of railway employees upheld for employees in safety sensitive positions); *Thompson*, 884 F.2d at 113 (testing upheld for civilian Army personnel working with chemical weapons); *see also* cases cited *supra* note 12.

[46] 712 F. Supp. 986, 991 (D.D.C. 1989).

[47] *Id.* at 991.

[48] *Id.*

[49] *Id.* at 992 (11 categories of employees were designated for testing, ranging in category from police officers to communication equipment operators).

[50] 888 F.2d 1189 (7th Cir. 1989).

[51] *Id.* at 1201.

[52] *Id.* at 1199 (employees who test positive are not fired; they instead are required to enroll in a treatment program, thus reducing the stigma of a positive test).

included in the Army's program to ensure minimization of the stigma of a positive test. Instead, soldiers are stigmatized further through prosecutions that can result in punitive discharges and federal convictions.

The only civilian court to have addressed the issue of whether the testing of urine is constitutional when the results of these tests routinely are used in a criminal prosecutions has been the Superior Court of Pennsylvania in *Commonwealth v. Danforth.*[53] The court in that case held that a Pennsylvania statute authorizing the search of a person's breath, blood, or urine, based solely on the fact that he or she was driving a vehicle involved in an accident in which death or injury occurred, was unconstitutional when the police officer lacked probable cause to believe that the driver was under the influence of drugs or alcohol.

The court distinguished *Skinner* and *von Raab* by stating that this was not a case in which "special needs" justified doing away with the fourth amendment requirements of probable cause and a warrant. Additionally, the court noted that the special needs cases, such as *Skinner* and *von Raab*, involve civil searches taking place outside of the context of criminal investigations.[54] The court reasoned that because a criminal defendant has much at stake, his fourth amendment rights are extremely important. Therefore, the court refused to extend the holding of *Skinner* to the context of a criminal investigation of driving under the influence.[55]

Recently, in *United States v. Bickel* the Court of Military Appeals addressed the constitutionality of the Army's urinalysis program in light of *Skinner* and *von Raab.*[56] The *Bickel* court thoroughly outlined the distinctions between the Army's urinalysis program and the programs upheld in *Skinner* and *von Raab.* Despite the distinctions, the Court of Military Appeals upheld the program as a valid military inspection under Military Rule of Evidence 313(b).[57] The court further noted that as long as the search is performed as a valid inspection, any "evidence" uncovered is incidental and does not render the search unconstitutional.[58] In addition, the Court of Military Appeals, citing *von Raab*, noted that military status alone may be enough to justify less protection in certain constitutional areas.[59]

The Current Challenge by Defense Appellate Division

In light of *Skinner* and *von Raab*, the Army's urinalysis program is ripe for another challenge. The Defense Appellate Division has filed a petition for writ of certiorari with the Supreme Court in *United States v. Peter,*[60] a case involving a prosecution for wrongful use of cocaine. The evidence upon which the soldier was convicted was obtained when he and approximately 300 other soldiers were chosen to provide urine samples for drug testing as part of a unit inspection. The petition challenges the constitutionality of the Army's urinalysis program in light of *Skinner* and *von Raab.*

Conclusion

In the current environment, in which concern over drug use is justifiably great, ensuring that citizens still are provided the protections guaranteed by the Constitution continues to be important. The courts cannot become blinded by social problems and should not interpret the Constitution to allow broader and more intrusive searches. The line must be drawn somewhere. The Defense Appellate Division is arguing that the line should be drawn where soldiers are subjected to extremely intrusive searches and the results of these searches are routinely used in criminal prosecutions. Such searches cannot continue unless they are justified by probable cause and a warrant is obtained.

Editor's Note—On 5 October 1990, the Supreme Court issued its decision to deny certiorari in the case of United States v. Peters.

[53] No. 01693 (Pa. Super. 1990) (en banc) (Lexis, States library, PA file).

[54] *Id.* at 15.

[55] *Id.* at 17.

[56] United States v. Bickel, 30 M.J. 277 (C.M.A. 1990).

[57] *Id.* at 282 (inspections under 313(b) are traditionally required to ensure the readiness of soldiers).

[58] *Id.* at 285.

[59] *Id.* at 283 (quoting *von Raab*, 109 S. Ct. at 1393-94, in which the Court stated that persons who join the military may "expect intrusive inquiries into their physical fitness."); *see also id.*, at 283-84 (citing Solorio v. United States, 483 U.S 435 (1987), in which the Supreme Court found that by reason of his military status a soldier is subject to court-martial without some of the safeguards available to defendants in federal and state courts).

[60] United States v. Peter, CM 63923 (C.M.A. 24 May 1990), *cert. denied,* ___ U.S. ___ (5 Oct. 1990).

DAD Notes

COMA Affirms Urinalysis Policy

In *United States v. Bickel*[1] the Court of Military Appeals recently upheld the constitutionality of requiring service members to submit urine samples as part of an inspection to determine and maintain unit readiness. The court also held valid a commander's policy requiring

[1] 30 M.J. 277 (C.M.A. 1990).

soldiers, who tested positive for illegal drugs when randomly selected to submit a urine sample during one inspection, to be retested during the following monthly inspection.

Private (PVT) Bickel was randomly selected to participate in a company-level urinalysis. His urine tested positive for marijuana, and he was required to participate in a random urinalysis one month later. Private Bickel's second test was directed pursuant to a policy letter issued by his company commander which provided that "any individual prescreened positive during the monthly random urinalysis test will be rescreened during the following month's urinalysis." The test results were positive and the results of the second urinalysis were the basis for convicting PVT Bickel of wrongfully using marijuana.

The court in *Bickel* determined that the second urinalysis could not be justified as a probable-cause search due to the six-week time lapse between the first positive test result and the second test. The court then opined that if the reception of the evidence of the second drug test was to be justified it must be pursuant to Military Rule of Evidence 313(b), which authorizes reception of "evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule."[2] According to Military Rule of Evidence 313(b), an "inspection" is "an examination ... to determine and to ensure the security, military fitness, or good order and discipline of the unit ... and that personnel are present, fit, and ready for duty. An order to produce body fluids, such as urine, is permissible in accordance with this rule."[3]

Quoting language from *United States v. Middleton*,[4] the Court of Military Appeals noted in *Bickel* that, in view of "the exigencies of military necessity and unique conditions that may exist within the military society, ... it is foreseeable that reasonable expectations of privacy within the military society will differ from those in civilian society."[5] The court cited the historical use of inspections and the nature of the military mission to explain the lessened expectation of privacy by service members.

The court in *Bickel* provided several reasons for its opinion that the testing of service members authorized by rule 313 pursuant to an "inspection" is constitutional, including the potential harm to the military mission and national security, and the fact that many service members have access to firearms. Deterrence of drug use by service members also was cited by the court as a justification for compulsory drug testing.

In *Bickel* the Court of Military Appeals adopted the language of the United States Supreme Court in *National Treasury Employees Union v. von Raab*,[6] stating:

> [o]perational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts.... Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.[7]

The court determined that the "military status of servicemembers may be decisive in establishing that they are subject to routine urinalysis as part of an inspection to determine and maintain readiness."[8] The court likened this use of "military status" to *Solorio v. United States*,[9] in which a majority of the United States Supreme Court decided that "military status" provided a bright line to determine whether a service member is subject to military jurisdiction.

The *Bickel* court also found that "the extensive notice that has been given to service members about the drug testing program is another circumstance tending to establish that compulsory drug tests are reasonable searches."[10] The court opined that the "regulations and policies established by the armed services for drug testing not only provide notice but also reduce the occasion for arbitrariness and abuse of discretion."[11] The fact that the positive results of drug tests are available to prosecutors was not found to create an unreasonable intrusion

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[2]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313 [hereinafter Mil. R. Evid.].

[3]Mil. R. Evid. 313(b).

[4]10 M.J. 123 (C.M.A. 1981).

[5]*Bickel*, 30 M.J. at 280.

[6]109 S.Ct. 1384 (1989).

[7]*Bickel*, 30 M.J. at 283 (emphasis and citations omitted). The issue of whether the Army's compulsory urinalysis program is constitutional in light of *von Raab* and Skinner v. Railway Labor Executives Assoc., 109 S.Ct. 1402 (1989), has been petitioned by Defense Appellate Division to the Supreme Court. Review was denied by the Court. United States v. Peter, CM 63923 (C.M.A. 24 May 90) (summary disposition), *cert. denied*, ___ U.S. ___ (5 Oct. 1990).

[8]*Bickel*, 30 M.J. at 283.

[9]483 U.S. 435 (1987).

[10]*Bickel*, 30 M.J. at 284.

[11]*Id.* at 285.

because the purpose of drug testing is to assure the fitness of service members, rather than to obtain evidence for prosecution. The strictly regulated environment of the military also was viewed as creating a reduced expectation of privacy for service members, thereby supporting the reasonableness of the inspection.

In addition, the *Bickel* court reaffirmed its previous holding in *Unger v. Ziemniak*[12] by concluding "that the use of direct visual observation is a permissible alternative for the armed services to use in order to avoid substitution or adulteration of urine samples that would frustrate the purposes of the drug testing program."[13]

The Court of Military Appeals found the policy letter issued by PVT Bickel's company commander, which provided for a second "inspection" test after a positive test result, to be a continuation of the original inspection. Because his initial selection for a drug test was "random," the court determined that "there was nothing arbitrary or whimsical about the choice of Bickel to be tested again; instead, the selection was made pursuant to a clear, and generally stated criterion. From this perspective he was not a 'specific individual ... selected for examination' within the meaning of Mil. R. Evid. 313(b)."[14]

In light of the *Bickel* opinion, similar command policies may be promulgated elsewhere. Defense counsel attacking the validity of positive drug test results pursuant to such a policy should concentrate on determining if problems existed with implementing or executing the strict letter of the policy such as the selection method or procedures used for the first test. Close scrutiny also should be given to the policy letter to determine if a basis for attacking the underlying motives for the letter exists. Any potential challenges should be litigated, thereby preserving the issue and documenting the facts for appeal. Captain Deborah C. Olgin.

Blocker and *York*: Army Court Extends the Application of *Pierce* Credit

Two previous DAD Notes reminded defense counsel that litigating pretrial confinement or restriction issues is often one of the few ways to gain real sentence relief for the client.[15] As a result of the Court of Military Appeals decision in *United States v. Pierce*[16] and two recent decisions of the Army Court of Military Review,[17] litigating prior nonjudicial punishments and administrative actions also may be a route to tangible sentence relief. In *Pierce* the accused received prior nonjudicial punishment for larceny of an aviator kit bag. At a subsequent court-martial, the accused was charged with, *inter alia*, the same larceny.[18] The Court of Military Appeals found that the imposition of nonjudicial punishment did not preclude the subsequent court-martial, but held:

> It does not follow that an accused can be twice *punished* for the same offense or that the *fact* of a prior nonjudicial punishment can be exploited by the prosecution at a court-martial for the same conduct. Either consequence would violate the most obvious, fundamental notions of due process of law. Thus, in these rare cases, an accused must be given *complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe.[19]

In *United States v. York* the Army Court of Military Review granted credit for nonjudicial punishment for an offense arising out of the same conduct for which the accused later was tried. In *York* the accused was found guilty of distribution of cocaine and soliciting the use of cocaine. The record of trial indicated that the accused previously had received nonjudicial punishment for use of cocaine arising from the same incident. The accused was not tried subsequently for the use offense; however, the record of nonjudicial punishment was admitted at the court-martial. In a brief decision, the Army court granted sentence relief in the form of reduction of confinement and elimination of forfeitures because it was "unclear whether the military judge intended to give *full credit* for prior nonjudicial punishment appellant received for the *same conduct*."[20]

In *United States v. Blocker*[21] the Army Court of Military Review extended the *Pierce* rationale to adverse administrative actions. In *Blocker* the accused was tried by a general court-martial for, *inter alia*, three sexual

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[12] 27 M.J. 349 (C.M.A. 1989).

[13] *Bickel*, 30 M.J. at 286.

[14] *Id.* at 287.

[15] *See* Note, *Credit Where It's Due*, The Army Lawyer, June 1988, at 24; Note, *Litigating Pretrial Confinement/Restriction Issues: New Counting is Old*, The Army Lawyer, Mar. 1988, at 26.

[16] 27 M.J. 367 (C.M.A. 1989).

[17] United States v. York, CM 8903751 (A.C.M.R. 29 Aug. 1990); United States v. Blocker, 30 M.J. 1152 (A.C.M.R. 1990).

[18] *Pierce*, 27 M.J. at 368.

[19] *Id.* at 369 (emphasis in original) (footnote omitted). For an example of how *Pierce* credit is computed see United States v. Collins, 30 M.J. 991 (A.C.M.R. 1990).

[20] *York*, slip op. at 1 (emphasis added).

[21] 30 M.J. 1152 (A.C.M.R. 1990).

assaults. Prior to the court-martial, the accused had appeared before an administrative discharge board for misconduct that included two of the three assaults for which he was later tried. The accused was reduced administratively as a result of the approval of an other-than-honorable discharge.[22] As a result, the accused appeared before the court-martial as a Private E1.[23] The Army court held that trial by court-martial for offenses previously considered by an administrative discharge board did not violate the constitutional prohibition against double jeopardy. The Army court also held that, on the facts of the accused's case, no denial of due process occurred.[24] Of significance to defense counsel, however, is that the Army court in *Blocker* went on to consider the *Pierce* principle of double punishment as it applied to the prior administrative reduction. The court noted that the accused had served at the reduced pay of a Private E1 for almost five months prior to the court-martial. Accordingly, the court awarded the accused dollar-for-dollar credit.[25] The Army court granted this credit even though "both the administrative discharge board and the general court-martial considered other misconduct."[26]

Both *York* and *Blocker* indicate a willingness on the part of the Army Court of Military Review to expand the holding in *Pierce*. As part of trial preparation, defense counsel should scrutinize records of nonjudicial punishment received by their clients and should be cognizant of all adverse administrative actions that are taken against the client. Defense counsel should pursue credit for these actions when appropriate. If this credit is denied at trial, counsel should continue to assert the right to this relief in post-trial submissions.[27] Captain Timothy P. Riley.

Without "Others," It Can't Be Murder Under Article 118(3)

Recently, the Court of Military Appeals granted a government petition for reconsideration to provide clarification on the distinction between homicides prosecuted under Uniform Code of Military Justice article 118(2)[28] and those prosecuted under article 118(3).[29] Defense counsel should be aware of this distinction because it involves an area in which the stakes rarely get higher.

The case came before the court upon certification from the Judge Advocate General of the Navy following a decision by the Navy-Marine Corps Court of Military Review setting aside Master-at-Arms First Class John W. Berg's unpremeditated murder conviction and life sentence.[30] Berg was tried for the murder of his girlfriend. The victim, Mess Specialist Second Class (MS2) Heidi Marie Habelt, was killed by a single gunshot wound to the head from Berg's .357 magnum revolver in the bedroom of the apartment she shared with Berg and her two children. Other than Berg, no one else witnessed Habelt's death.[31]

At trial the bulk of the government evidence went to prove that the accused intentionally killed Habelt. Government counsel presented evidence that Berg had threatened Habelt because she had talked in her sleep about a former boyfriend, and that Berg and the victim had argued shortly before the killing. The government called two former girlfriends of the accused, who testified that he was violent and had a bad temper. Ballistics and forensic evidence showed that the gun was fired at close range and probably set against the victim's head before it was fired. The government also presented evidence that, if a bullet were fired from a .357 magnum revolver into the ceiling structure of the apartment, the bullet would pass through and into the apartment above. The occupant of the apartment above Berg's testified that he was at home at the time of the shooting. The government presented no evidence that a bullet ever was fired at the ceiling.[32]

The defense presented evidence that the victim had been emotionally upset for some time and had attempted suicide as a teenager. According to Berg, following an

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[22] *Id.* at 1153.

[23] *Id.* at 1154.

[24] *Id.*

[25] *Id.* at 1155-56.

[26] *Id.* at 1155.

[27] *See* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105, 1106. In *Pierce* the Court of Military Appeals noted that "the best place to repose the responsibility to ensure that credit is given is the convening authority." *Pierce*, 27 M.J. at 369; *see* United States v. Burum, 30 M.J. 1075 (A.C.M.R. 1990) (convening authority granted *Pierce* credit on advice of the staff judge advocate).

[28] Uniform Code of Military Justice art. 118(2), 10 U.S.C. § 918(2) (1982) [hereinafter UCMJ].

[29] United States v. Berg, CM 62,139, slip op. at 4 (C.M.A. 15 Sept. 1990). Unpremeditated murder developed from English and American common law to punish an accused for his or her implied "depraved heart" by proscribing conduct that was inherently dangerous to another and that showed wanton disregard for human life. *Id.*; *see also* United States v. Berg, 31 M.J. 39 (C.M.A. 1990).

[30] United States v. Berg, 28 M.J. 567 (N.M.C.M.R. 1989).

[31] *Id.* at 568.

[32] *Berg*, 30 M.J. at 197.

argument, Habelt went into the bedroom and obtained his loaded weapon. Fearing that Habelt might "do something stupid," Berg tried to take the gun from her and, in the struggle that ensued, the weapon fired and killed her. The accused denied ever intentionally shooting Habelt.[33]

The military judge instructed the members that if they found either that Berg had intended to kill or that his act was inherently dangerous to others or showed a wanton disregard for human life, he could be found guilty of the offense of unpremeditated murder.[34] The trial defense counsel objected to the instruction, arguing that the evidence was insufficient to show a violation of article 118(3). After the instruction was given, the defense counsel asked for a clarifying instruction, but his request was denied. The panel returned with a general finding of guilty.

In its original opinion, the Court of Military Appeals, upheld the decision of the Navy-Marine Corps Court of Military Review by holding that the evidence regarding the unpremeditated murder charge was insufficient to support a finding that the accused's conduct was "inherently dangerous to others and evinced a wanton disregard of human life," and that the military judge erred in instructing the panel on that element of article 118(3). The court below found that the evidence tended to establish that the accused's actions were inherently dangerous to others but reversed the conviction, finding that because the accused's animus was directed solely at the victim, he could not be guilty under article 118(3) as a matter of law. The Court of Military Appeals also determined the error to be prejudicial, requiring the findings and sentence to be set aside, because it had no way of knowing whether the accused was convicted on that theory of unpremeditated murder.[35]

On reconsideration, the court adhered to its decision and gave little weight to the government's argument that it need not show that "others" were endangered, but only that another was endangered by the accused's actions, to support a finding of guilty of a violation of article 118(3). The court looked to legislative history,[36] an 1854 New York state court opinion,[37] and its own precedent, and found ample support for the view that a murder under article 118(3) always must be inherently dangerous to *others* and evince a wanton disregard for human life *in general*.[38]

The practical effect of this decision should be kept in mind by defense counsel who are in the unfortunate position of facing a fact-pattern similar to the one in *Berg*. In a similar case, the government would be limited to proving unpremeditated murder by an *intent* to kill or inflict great bodily harm under article 118(2). Otherwise it may be forced to settle for involuntary manslaughter under article 119. The Court of Military Appeals recognized that its decision could present some incongruous results.[39] It also recognized that its decision was different from some jurisdictions in which the common law of second degree murder has developed so an accused may be convicted if his actions are directed not only at others but also at a single victim.[40]

The court deferred to Congress to correct the situation. Accordingly, until Congress takes action to revise Article 118(3), military law on "depraved heart" murder is clear—for an accused to be convicted of murder under article 118(3), his actions must be inherently dangerous to, and show a wanton disregard for the life of, not only the victim, but also others as well. Captain Mark L. Toole.

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[33] *Id.* at 197.

[34] The military judge instructed the members:

> You can find the accused guilty of the offense only if you find the elements I am about to list for you beyond any reasonable doubt. The first element is that Heidi M. Habelt is dead. The second, that her death resulted from the act of the accused in shooting her in the head with a .357 magnum revolver on or about 23 February 1986 in Mountain View, California. The third is that the killing of Heidi Habelt by the accused was unlawful, and the fourth element is that at the time of the killing, the accused intended to kill or inflict great bodily harm or that his act was inherently dangerous to others and showed a wanton disregard for human life.

Id. The military judge further advised the panel, "You will note that the fourth element has two parts. I will discuss and provide definitions for each part, but you are advised that either one or the other part would be sufficient. *Id.*

[35] *Id.* at 196.

[36] In United States v. Davis, 10 C.M.R. 3, 8 (C.M.A. 1953), the court stated that the only bit of legislative guidance found, "[a] single straw in the wind, but a frail one" was that article 118(3) is intended to cover those cases in which the acts resulting in death are calculated to put human lives in jeopardy, without being aimed at any one in particular. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1231 (1949).

[37] Darry v. People, 10 N.Y. 120 (1854) (interpreting New York's 1829 second degree murder statute).

[38] *See* United States v. Hartley, 36 C.M.R. 405, 410 (C.M.A. 1966); United States v. Judd, 27 C.M.R. 187, 192 (C.M.A. 1959); United States v. Davis, 10 C.M.R. 3, 8 (C.M.A. 1953).

[39] The court gave the example of an accused who, while alone in a room with another person, fires a gun at the victim's feet intending only to scare him, but the bullet inadvertently ricochets off the floor, killing the victim. The government would not be entitled to an instruction under article 118(3) because no "others" were endangered by the accused's actions, even though the conduct was inherently dangerous to another and showed a wanton disregard for human life. If more than two persons, however, were present in the room when the accused fired the gun, he may be found guilty of murder under that article.

[40] *Berg*, slip op. at 8.

Limiting the Sixth Amendment

In two recent decisions, the Court of Military Appeals, relying on decisions of the Supreme Court, has circumscribed the right of soldiers accused in child sex-abuse cases to physically confront the witnesses who testify against them at trial. In *United States v. Thompson*[41] the court upheld an Air Force Court of Military Review decision permitting alleged child-sodomy victims to testify in the presence of the accused, but with their backs to him. In *United States v. Batten*[42] the court upheld, on harmless error grounds, a Navy-Marine Corps Court of Military Review decision permitting an alleged child-victim to testify behind a partition via closed-circuit television. While these decisions reiterate that the sixth amendment right to face-to-face confrontation[43] is not "absolute,"[44] trial defense counsel should be aware of the remaining limitations on the government's ability to restrict an accused's right to face his accusers.

The courts-martial in both *Thompson* and *Batten* consisted of military judges sitting alone. In *Thompson* the trial counsel's proposal to have the child-victim witnesses testify with their backs to the accused was supported *in limine* by an expert-witness psychologist's testimony that the children had expressed "a great deal of anxiety and fear" about being in the courtroom with the accused.[45] The psychologist testified that, in his expert opinion, this fear would impair the children's "*ability to talk about their experiences and to actively think about the questions that they're responding to*,"[46] if they were compelled to testify in the accused's direct line of vision. The military judge adopted this prediction in his findings of fact, and further stated that the proposed seating arrangement would have no effect on the court with regard to the presumption of innocence of the accused.[47]

After balancing "*the trauma to the children if forced to testify facing the accused*" against the accused's right to face-to-face confrontation, the military judge found that the procedure proposed by the trial counsel would not prejudice the rights of the accused and was necessary to ensure that the witnesses testified freely.[48] Accordingly, the military judge permitted the children to testify in the proposed fashion.

In upholding this procedure, the Court of Military Appeals listed four "safeguards" supposedly observed by the trial court: 1) the military judge had ensured that "the children understood the solemnity of the oath to testify truthfully"; 2) the defense had been given "every opportunity to rigorously cross-examine them as to their testimony"; 3) the military judge as factfinder "was able to observe the boys' demeanor and assess their credibility"; and 4) "most importantly, ... the military judge ... specifically found that the procedure utilized to protect the children was *necessary*."[49] Thus, the Court of Military Appeals was convinced that the procedure of seating each child-witness with his back towards the accused while testifying did not violate the accused's right of confrontation.[50]

In *Batten*, as in *Thompson*, a psychologist testified in support of the trial counsel's motion *in limine* to limit face-to-face confrontation.[51] Once again, the expert testimony was that the child witness would be frightened to the point of psychological trauma if called to testify facing the accused.[52] The military judge subsequently permitted the child to testify through closed-circuit television, provided that she sat in the courtroom, albeit behind a partition.[53] As in *Thompson*, the military judge in *Batten* based his ruling on a finding of "necessity," in that face-to-face confrontation with the accused might "traumatize" the child and adversely affect her testimony.[54] While the Court of Military Appeals affirmed the *Batten* decision on other grounds—"harmless error" because the child-victim's testimony purportedly "played no role" in the accused's conviction[55]—the court nonetheless found "no error in the particular determination [of necessity] made by the military judge."[56]

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[41] 31 M.J. 168 (C.M.A. 1990).

[42] 31 M.J. 205 (C.M.A. 1990).

[43] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.

[44] *See Thompson*, 31 M.J. at 169; *Batten*, 31 M.J. at 207.

[45] *Thompson*, 31 M.J. at 169.

[46] *Id.* (emphasis in original).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 170 (emphasis in original).

[50] *Id.*

[51] *Batten*, 31 M.J. at 208.

[52] *Id.*

[53] *Id.* at 209.

[54] *Id.*

[55] *Id.* at 212.

[56] *Id.*

In both *Thompson* and *Batten*, the Court of Military Appeals followed the decision of the Supreme Court in *Maryland v. Craig*.[57] In *Craig* the Court upheld a Maryland statute permitting a child witness to testify from outside the courtroom via closed-circuit television if the trial court first found that in-court testimony would cause "serious emotional distress such that the child ... [could not] reasonably communicate."[58] Significantly, however, the Court in *Craig* established, as a condition-precedent to making special arrangements, that the judge must make a case-specific finding of necessity.[59] That is,

> the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant ... Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify."[60]

Thompson and *Batten* are also significant because each involved trial by military judge alone, and because the military judge in *Thompson* specifically had announced that the special seating arrangement in that case would "not have any effect on the Court with regard to the presumption of innocence of the accused."[61] In a dissenting opinion to the Court of Military Review's decision, Senior Judge Lewis asked:

> What might the military judge have found in this regard if this had been a trial before members rather than the military judge, sitting alone? I fear that an arrangement to shield or move witnesses to a position where they might avoid direct eye-to-eye contact with an accused will be difficult to handle without significant risk of prejudice in a trial before members. Any method that is employed is surely going to be obvious to the members. Does such an arrangement convey an unmistakable message that someone in a position of authority, presumably the military judge, has determined that the accused has caused grievous physical or psychological harm or that he otherwise represents a danger to the child witness or witnesses who appear to testify? These may be legitimate aggravation considerations, but at an appropriate point in the trial once the issue of guilt has been properly determined.[62]

The Court of Military Appeals left this question "for another day."[63]

Trial defense counsel should keep this question, as well as the other limitations, in mind when the government proposes special arrangements for child witnesses. As Justice Scalia observed in *Coy v. Iowa*,[64] "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."[65] Therefore, preserving all objections to special arrangements for child witnesses at the trial level is extremely important. If, prior to imposing limitations on an accused's confrontation rights, the trial court fails to make an adequate inquiry, enter an appropriate case-specific finding of necessity, or safeguard the presumption of innocence, the accused may find relief on appeal. Captain Emmett G. Wells.

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[57] 110 S. Ct. 3157 (1990).

[58] *Id.* at 3161.

[59] *Id.* at 3169.

[60] *Id.* (citations omitted).

[61] *Thompson*, 31 M.J. at 169.

[62] United States v. Thompson, 29 M.J. 541, 548 (A.F.C.M.R. 1989) (Lewis, S.J., dissenting), *aff'd*, 31 M.J. 168 (C.M.A. 1990).

[63] *Thompson*, 31 M.J. at 172 n.6.

[64] 487 U.S. 1012 (1988).

[65] *Id.* at 1020. The confrontation right protects against false testimony. Therefore, proper application of the right should presume a witness's testimony will be false. Allowing special seating arrangements on a finding of necessity turns the presumption on its heal because the finding of necessity invariably presumes the truthfulness of the witness's testimony.

A Commander's Broad Reach: Perspective on *United States v. Bickel*

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Introduction

In *United States v. Bickel*[1] the United States Court of Military Appeals held that a written, established policy that automatically required soldiers who tested positive for drug use to be retested the month following the positive result was a proper inspection under Military Rule of Evidence 313(b).[2] The court equated a commander with a building inspector in ruling that soldiers who test positive for illegal drugs later may be retested for drug use, and that the results of those tests are admissible in courts-martial. In upholding the policy letter, the court emphasized that: 1) it was written before Bickel's test was conducted; 2) the retesting policy had a primary military purpose; and 3) it applied to all soldiers without exception. The court reiterated service members' lesser expectation of privacy and the constitutionality of Military Rule of Evidence 313. In addition, it again endorsed the effectiveness of the urinalysis program.

The Facts

In May 1987, a cavalry troop commander published a drug and alcohol policy letter that included the following sentence: "*Any* individual prescreened positive during monthly random urinalysis testing will be rescreened during the following months (sic) urinalysis."[3] One of his soldiers, Private Barry Bickel, took a random urinalysis on 10 June 1987.[4] On 17 July the commander received a report that Bickel's test was positive for marijuana. On 21 July the commander had Bickel retested pursuant to the policy letter. Bickel tested positive again. He was court-martialed and convicted of using marijuana on the basis of the second test. He appealed.

No Discretion

The issue in *Bickel* concerns trial counsel not only as prosecutors but also as legal advisors to commanders. To that end, the court offered explicit, intelligible guidance for drafting urinalysis policy letters. It said compulsory urinalysis retesting is permissible "on a nondiscriminatory basis pursuant to an established policy or guideline that will eliminate the opportunity for arbitrariness by the person performing the tests."[5] This means that the policy, as in Bickel's case, must apply to all soldiers and leave no discretion to the implementing commander.

The court emphasized that the policy letter should be written in such a way that its implementation is virtually automatic. The decision to retest a soldier should be "made pursuant to clear, and generally stated, criteri[a]" so that there can be no credible contention that the decision to retest was "arbitrary or whimsical."[6] The court also said "neither Mil. R. Evid. 313 nor the Fourth Amendment permits a military commander to pick and choose ... who will be tested for drugs and then to use the resulting evidence to obtain a criminal conviction."[7]

Written Policy Provides Notice, Deters Arbitrariness

The simple fact that this policy was in writing carried enormous legal and practical significance. A written policy provides notice to soldiers, sets guidelines against

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[1] 30 M.J. 277 (C.M.A. 1990).

[2] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313(b), [hereinafter Mil. R. Evid.] provides, in part: "An 'inspection' is an examination of the whole or part of a unit ... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit." Purposes of inspections include ensuring:

> that the command is properly equipped, functioning properly, maintaining proper standards of readiness ... sanitation and cleanliness, and that personnel are present, fit and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule.

Id.

[3] Commander's Policy Letter, HQ, 5th Infantry Division (Mech), CAV-A, 20 May 1987, subject: Alcohol and Drug Abuse, para. 3F [hereinafter Policy Letter] (emphasis added). The policy letter is reprinted in full as an appendix to the Army Court of Military Review's opinion. *See* United States v Bickel, 27 M.J. 638, 644-45 (A.C.M.R. 1988).

[4] There was no issue as to the randomness of the initial selection. Bickel was tested along with some other unit members. *Bickel*, 30 M.J. at 279.

[5] 30 M.J. at 286 (citing Florida v. Wells, 110 S. Ct. 1632 (1990)). *Wells* provides an example of how *not* to implement such a policy. An arguably reasonable search of a locked suitcase in Wells' car was not justified because there was no state highway patrol policy for such searches—meaning that too much discretion was left in the hands of the searcher.

[6] *Id.* at 287.

[7] *Id.* at 286.

which to test the command's actions, and deters arbitrary acts by commanders.

Just as Military Rule of Evidence 313(b) suggests that an inspection may not be an inspection if it comes on the heels of a report of crime,[8] the court put a great deal of stock in the fact that "the commander had published his policy before Bickel's first specimen was taken." Therefore, it said, "the commander did not promulgate a policy directed toward Bickel or any other specific individual."[9] Were this the case, the court likely would have viewed it as "a trick" or "a subterfuge"[10] to attack conduct the commander otherwise could not reach.

The Policy Letter Gives a Reason

Because the fourth amendment does not apply to military inspections, probable cause does not enter into the analysis of whether Bickel's drug test was proper. This analysis has two important components: 1) Military Rule of Evidence 313 clearly stands outside of the fourth amendment, and 2) the commander must make clear that the purpose of the policy fits within the purposes stated in Military Rule of Evidence 313(b).[11] This second factor warrants the greatest attention by authors of policy letters.

A letter that states the reasons for the testing policy it prescribes is far preferable to forcing the commander—or a successor in command—to try to reconstruct the basis for the letter in arguably self-serving testimony well after it was promulgated. Accordingly, a poorly-drafted letter could damage later efforts to prosecute.

Bickel's commander wrote his policy letter in clear, unadorned language. It unambiguously tied his policy to one of the purposes listed in Military Rule of Evidence 313(b), eliminating the issue of whether it was a subterfuge to gather evidence for prosecution. The letter read in part: "Abuse of any drug ... is detrimental to unit performance, compromises individual integrity and ultimately endangers the health and welfare of the abuser and those who work around him."[12] This language enabled the court to find that the letter complied with the "primary objective of the armed services [which] is to assure that servicemembers are physically and mentally fit to perform their military duties."[13]

Reiterating the Ills of Drugs in the Military

While *Bickel* has potential application to areas other than drugs, the court seized on the language contained in the policy letter to provide a catalog of the unique dangers that drugs pose to military units. The court said drug use "harms the military mission; ... diminishes the military effectiveness [of soldiers; and] ... endanger[s] other persons, their property, and government property."[14] Drug abusing soldiers, the court said, "have the potential to do great harm to the military mission and to national security."[15]

The court emphasized that every soldier is potentially dangerous:

> [While] a pilot or a tank operator usually will have a greater potential for harm [than a clerk], even a servicemember performing far away from active military operations may be ... vital for those operations. Moreover, in the event of an emergency, a servicemember with a very routine job may be called on short notice to perform a more typically "military" task.[16]

Finally, the court said almost all soldiers "have duties which potentially require possession of firearms at a moment's notice"—still another reason that they must be ready at all times.[17]

Drafters of policy letters should consider such language in laying out the predicate for retesting. Ideally, a commander should tie the dangers of drug use to the unit's mission, but the court seems willing to find that drug abuse by any soldier, no matter how far removed from "front line" responsibility, can harm the military mission.[18]

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[8] Mil. R. Evid. 313(b) provides in pertinent part: "If ... the examination was directed immediately following a report of a specific offense in the unit ... and was not previously scheduled ..., the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule."

[9] *Bickel*, 30 M.J. at 287. Judge Cox wrote separately to voice his opinion that prior announcement of the commander's policy, while "good evidence of a legitimate purpose," is not determinative of the inspection's legality. *Id.* at 288 (Cox, J., concurring).

[10] *Id.* at 287.

[11] Prosecutors will have to prove by clear and convincing evidence that an examination was a proper inspection if it "was directed immediately following a report of a specific offense in the unit," if "specific individuals are selected for examination," or if "persons are subjected to substantially different intrusions during the same examination..." Mil. R. Evid. 313(b).

[12] Policy Letter, *supra* note 3, at para. 2.

[13] *Bickel*, 30 M.J. at 285.

[14] *Id.* at 280.

[15] *Id.* at 282.

[16] *Id.* at 282-83.

[17] *Id.* at 283.

[18] The court's discussion of the harms of drug abuse, while not unique, provided a ready reference for counsel in constructing arguments in drug cases. Do not, of course, quote the court, but argue the inherent dangers of drugs and tie them to the accused in your case, no matter how "remote" his duties from combat-related missions. "[E]ven a servicemember performing far away from active military operations may be operating a computer which processes information vital for those operations." *Id.*, at 282.

The "Reasonable Inspector"

The best way to view the *Bickel* court's holding—and to explain it to commanders—is through the prism of its broad endorsement of Military Rule of Evidence 313(b). The court unequivocally rejected any notion that military inspections can be equated to traditional fourth amendment searches, emphasizing that "[t]he purpose of an inspection is to correct an injurious or dangerous condition."[19] The court then continued by noting, "This is true whether the inspection is performed by a civilian building or housing inspector, or is performed by a commander or first sergeant."[20] The court stressed that under these circumstances, the commander's role as inspector stands wholly apart from his authority to authorize searches.

A reasonable inspector, the court insisted, not only checks for problems, but when he "discovers a violation during a routine inspection will return later to the site to determine if the defect has been remedied. We see no reason—theoretical or practical—why a military inspection should be conducted differently."[21]

Continuing its analogy to building inspectors, the court suggests that a conscientious inspector "will not simply call the defect to the attention of those involved and then forget about it. Instead, he usually will—and should—check back to determine if a defect ... has been corrected."[22] Applying this rationale, the court concluded that "it was quite rational for Bickel's company commander to determine whether any member of his unit who had tested positive on one occasion ... had corrected his substandard condition."[23] Thus, "the second test should be viewed as a continuation of the original inspection."[24]

Distinguishing *Skinner* and *von Raab*

Bickel gave the Court of Military Appeals its first opportunity to address the urinalysis program since the Supreme Court's two 1989 urinalysis decisions. In *Skinner v. Railway Labor Executives' Ass'n*[25] the Court upheld the urinalysis drug testing of certain railroad employees following train crashes; in *National Treasury Employees Union v. von Raab*[26] the Court held that United States Customs Service employees seeking transfer or promotion to positions involving drug interdiction or handling firearms could be tested for drugs.

Although the two decisions upheld limited drug testing of civilian employees, the Court of Military Appeals relied on them only to the extent that they found that individuals "located in a highly regulated environment ... have a reduced expectation of privacy."[27] The court found important distinctions between *Skinner* and *von Raab*, and the military. The court noted that soldiers, unlike civilian employees, need not be tested in a medical atmosphere, their samples may be collected by coworkers, direct observation is permissible, soldiers may be tested regardless of their duties, and, most importantly, no special notice was required.[28]

In reiterating the principle that all soldiers are eligible for drug testing regardless of their duties, the court reinforced the long-standing concept of the military as a separate society. The court explained that "those who enter the armed forces realize that, by doing so, they are changing their status materially and that they will enjoy less privacy than before."[29]

Drafting the Letter

In drafting a policy letter aimed at drug use—or in advising the drafter—trial counsel should do the following:[30]

> —Draft the letter for the battalion- level commander's signature. These policies can be promulgated most efficiently at this level. At higher levels, it may be harder to put forth the underpinnings for the policy, and at the company or battery level, trial counsel may find it difficult to monitor all of the possible letters in circulation.

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[19] *Id.* at 287.

[20] *Id.* (citations omitted).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 288.

[25] 489 U.S. 656 (1989).

[26] 489 U.S. 602 (1989).

[27] *Bickel*, 30 M.J. at 285.

[28] *Id.* at 284-85, 286; *see also* United States v. Lizasuain, 30 M.J. 543, 545 (A.C.M.R. 1990) (finding that *von Raab* "was based on factors peculiar to the Customs Service's mission" and that *von Raab* "reaffirmed the basic premise that the Army's warrantless drug testing program is subject [only] to the reasonableness requirement of the fourth amendment.").

[29] *Bickel*, 30 M.J. at 285.

[30] A sample policy letter that prosecutors may suggest to commanders, taken from the September 1990 TCAP Memo, is appended to this article. *See infra* appendix.

—State the rationale for the policy letter. Emphasize the detrimental effect drug use will have on this unit's mission. Read Military Rule of Evidence 313(b). Tie the policy to its language—that is, "the security, military fitness, or good order and discipline of the unit" and "the command is properly equipped, functioning properly, maintaining proper standards of readiness . . . and that personnel are present, fit, and ready for duty."[31]

—Ensure the policy applies across the board with no exceptions.[32]

—Be precise in defining to whom the policy letter applies. It will be construed against the drafter.[33]

—Make sure the unit logistically can carry out the policy—that is, do not commit the unit to more frequent testing than it can expect to carry out. For example, know how often urinalysis allocations are received.

—Remember the test window. While the primary purpose of such testing cannot be for the gathering of criminal evidence, generation of such evidence is a by-product of the inspection scheme. With that in mind, be aware of the thirty-day testing window for marijuana. This means a positive urinalysis for marijuana less than thirty days after the last test cannot be said definitively to reflect a separate use of marijuana. Therefore, while testing at less than monthly intervals may be justifiable, a thirty-day gap will be necessary to establish a separate criminal use of marijuana.

—Make clear that the policy does not affect, and is independent of, any testing that might be directed under the Alcohol and Drug Prevention and Control Program (ADAPCP) administered under Army Regulation 600-85.[34] This ensures admissibility of the tests and removes any assertion that a test result constitutes "limited use evidence."[35]

Do *not* do the following:

—Indicate that any violations "will be prosecuted." Each case must be addressed on its merits. To do otherwise violates the requirement to dispose of each case at the "lowest appropriate level of disposition," after weighing factors unique to each case.[36]

—Mix alcohol and drugs. There is no need to address both in the same letter. It is better to address them in separate letters, because the strategies for ensuring readiness in these areas will not be identical.

Extending *Bickel*

The *Bickel* principles apply to more areas than drug abuse. Commanders may have reasons for policy letters covering many areas of conduct, ranging from prohibiting drinking in the barracks, to barring tattoos on visible areas of the body. For all policy letters affecting soldiers' privacy rights, trial counsel, as legal advisors, should ensure that their commanders can articulate a purpose among those listed in Military Rule of Evidence 313(b). While *Bickel* involved illegal drugs, the court's analysis— especially that of the "reasonable inspector"—can be extended prudently to other areas in which a commander's concern properly relates to ensuring that his unit is ready to accomplish its mission.

Appendix

The following is a proposed policy letter that counsel may want to adapt for use in the units they serve:

1. Use of illegal drugs corrupts a military unit. Soldiers who use drugs harm the unit's mission because they jeopardize themselves, their fellow soldiers, and government equipment. Soldiers who use drugs are not physically and mentally fit. Soldiers who use drugs are not ready to accomplish their military duties and are unreliable.

2. To attack drug abuse and keep this unit fit to fight, we will conduct periodic, random urine testing (inspections). A positive test for use of any illegal drug is indicative of a problem that needs to be corrected. Such use also may subject the soldier to administrative or criminal sanctions.

3. Because a positive urine test reflects the need for command attention, the following policy will be in effect with regard to positive urine tests for illegal drugs:

a. Any soldier who tests positive for drugs will be retested during the next urinalysis, or the subsequent one if the soldier had an authorized absence from duty at the test site. There are no exceptions to this policy.

b. Testing pursuant to this policy is independent of any testing that may be conducted as part of the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) and is *not* protected by the limited use policy of AR 600-85.

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[31] Mil. R. Evid. 313(b).

[32] In United States v. Daskam, 31 M.J. 77 (C.M.A. 1990), the Court of Military Appeals considered the failure of a Navy unit to follow strictly its own policy that mandated testing of all soldiers returning from unauthorized absences. The court considered the failure to test all such returning soldiers to be "significant," but it did not have to address the issue, because it invalidated the testing on other grounds. *See id. Daskam* points up the need to ensure that a policy is applied uniformly applied.

[33] In *Daskam* the Court of Military Appeals barred the introduction of the results of urinalysis tests conducted on a sailor who returned from three failures to repair (FTRs). The unit policy letter required testing of "all personnel who surrender or are apprehended after an unauthorized absence." *Daskam*, 31 M.J. at 78. Construing the language strictly against the policy's author, the government, the court found that the FTRs did not equate to unauthorized absences and that, therefore, the testing of Daskam was beyond the scope of the policy. *Id.*

[34] Dep't of Army Reg. 600-85, Personnel—General: Alcohol and Drug Abuse Prevention Program (21 Oct. 1988).

[35] *Id.*

[36] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 306(b).

The Readability of Records of Trial

Once again, the Army Court of Military Review has begun to encounter records of trial that do not meet the court's standards of readability—much less those of the United States Court of Military Appeals and the United States Supreme Court. In some instances, a computer-driven printer, though capable of producing letter-quality work, evidently was not programmed to generate a letter-quality transcript. In other transcripts, the deficiency in readability resulted from an apparent failure to change ribbons. In addition, the court occasionally has received a transcript that the reporter failed to double-space.

As noted in past issues of *The Army Lawyer*, the following standards apply to all transcripts: 1) the required original verbatim transcript must be printed double-spaced on one side only of standard letter-size white paper; 2) the type font must be Pica, Courier 10, or a similar typeface with no more than ten characters per inch; 3) the font used must clearly distinguish each letter from all other letters, such as distinguishing an "l" from an "i"; and 4) the type used must produce a clear, solid, black imprint of the kind normally produced by a typewriter, impact printer, or laser printer.

Copies of the record provided for appellate defense and government counsel may be reproduced copies; however, they must meet the same standards of readability.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Urinalysis Testing And Consent: Can Probable Cause Cure Invalid Consent? COMA Says "Sometimes"

In *United States v. McClain*[1] the Court of Military Appeals wrestled once again with the admissibility of a urine sample obtained through a soldier's purported "valid consent" under circumstances later determined to show a lack of consent. The issue in *McClain* was whether probable cause to compel a urinalysis test provided an alternative basis to admit a urine sample obtained through invalid consent. The *McClain* court held that probable cause sometimes will cure invalid consent.

The Court of Military Appeals earlier addressed the consent issue in urinalysis situations in *United States v. White*.[2] In *White* an Air Force Office of Special Investigations (OSI) agent told the accused's commander that a "reliable" informant had told him that the accused had used drugs during her recent leave. Accordingly, White's commander asked her to "consent" to a urinalysis. When she asked what would happen if she did not consent to a urine test, her commander told her that he "would order her to provide the sample."[3] The accused's commander did not tell her the difference between a consensual urinalysis and compelled—or command-directed—urinalysis, nor did he tell her the legal ramifications of the two types of tests. The Court of Military Appeals reversed White's conviction, noting that White had asked what would occur if she did not consent to an urine test. Because her commander responded by threatening to order a test, and because he failed to "meaningfully explain to her"[4] the consequences of a consent urine test versus "command-directed" urine test, White effectively had no real option to refuse the urinalysis. Consequently, because White effectively was unable to give valid consent and could only manifest "mere acquiescence,"[5] the urine sample

[1] 31 M.J. 130 (C.M.A. 1990).

[2] 27 M.J. 264 (C.M.A. 1988).

[3] *Id.* at 266.

[4] *Id.* Results of any "consent" urinalysis are admissible at trial by court-martial. Commanders also may use them for administrative elimination proceedings. *See* Army Reg. 635-200, Personnel Separations: Enlisted Personnel, chap. 1 (1 Dec. 1988). An ordered—or command-directed—test not based on probable cause, while lawful as a "fitness for duty" urinalysis, could not be the basis for judicial or non-judicial proceedings. The results also are of limited use in administrative proceedings because the commander cannot use them to characterize the discharge.

[5] *See White*, 27 M.J. at 266.

was inadmissible. Importantly, because the government raised only consent as a reason for admissibility, the *White* court did not address the possibility of alternative bases for admissibility. In addition, the record of trial did not show that probable cause existed to believe that the accused had used illegal drugs.

The existence of probable cause to order a urinalysis test did exist, however, in *United States v. Simmons.*[6] Simmons and a companion were sitting in a motor vehicle in a "heavy drug-trafficking area."[7] Their suspicious conduct caused the local civilian police to remove Simmons' friend from the car, and they subsequently found a small quantity of cocaine during a search of the vehicle. The police then arrested Simmons. After his release from custody a few hours later, Simmons reported to his supervising noncommissioned officer (NCO), where the NCO informed him that he must either consent to a urinalysis test or the commander would order a test. Simmons "consented" to a urinalysis, which later showed positive for cocaine. In accord with the Court of Military Appeals' earlier decision in *White*, Judge Cox determined that the accused had not consented to a urinalysis test. Instead, he found that Simmons' "'consent' was not voluntary, but given merely in acquiescence to color of authority."[8] Unlike the facts in *White*, however, "there was adequate probable cause upon which the command could have ordered the urinalysis...."[9] The *Simmons* court held that this probable cause cured the invalid consent, even though a commander never authorized the taking of a urine sample from Simmons, nor did any authorizing official have knowledge of facts amounting to probable cause. Nonetheless, the unequivocal language in *Simmons*—that is, probable cause cures invalid consent—means that courts apparently no longer need to examine the issue of whether a proper official actually gave the authorization to search.

The literal application of *Simmons*, however, did not make for a sound result in a subsequent Navy case. In *United States v. McClain*[10] civilian police arrested the accused and three other sailors. When he was back under Navy control the following day, the accused's commander asked him to consent to a urinalysis. The trial judge in *McClain*, however, suppressed the results of the urine test on the grounds that "the consent was involuntarily given."[11] The government appealed from the suppression ruling and the Navy-Marine Corps Court of Military Review reversed, reluctantly following the rationale of *Simmons*. According to the Navy-Marine Corps court, *Simmons* stood for the proposition that a search authorization "that could have been but was not given" is equivalent to "a valid and existing search warrant."[12] The *McClain* court acknowledged that this idea contradicts orthodox fourth amendment analysis, but held that, after the Court of Military Appeal's decision in *Simmons*, military courts now must interpret article 90 of the Uniform Code of Military Justice[13] as constituting

> a blank, general, inchoate search authorization in the possession of every military commander at all times, upon which, whenever probable cause comes into being, an *invisible hand* writes, filling in the blanks so as to define its terms coextensively with the probable cause, whereupon it ripens into a lawful search authorization requiring neither physical substantiation nor verbal articulation; in fact neither the commander nor the individual physically conducting the search need be aware that any of this has ever happened.[14]

The Court of Military Appeals, however, expressly rejected this curious "invisible hand" fiction—the logical extension of the rationale that the court began in *White* and *Simmons*—in its reversal of the Navy-Marine Corps court's decision in *McClain*. Cognizant of the confusion created by *Simmons*,[15] the Court of Military Appeals presented a new analysis of the circumstances under which probable cause cures invalid consent.

In the *McClain* court's opinion, Judge Cox discussed consensual urine testing at some length. He noted that the

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[6] 29 M.J. 70 (C.M.A. 1989).

[7] *Id.* at 72.

[8] *Id.*

[9] *Id.*

[10] 30 M.J. 615 (N.M.C.M.R. 1990).

[11] 30 M.J. at 618.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 618-19 (emphasis added).

[15] 31 M.J. at 134.

court continued to adhere to the basic principle announced in *White*—that is, consent obtained *without* the threat to order a urinalysis is admissible and that consent obtained *with* the threat of an order is inadmissible.[16] Judge Cox added, however, that consent given under the threat of a *potential* search warrant or search authorization is possibly admissible, and that consent given under the threat of an *actual* search warrant or search authorization is admissible—not because of consent, but because of the warrant. Finally, the *McClain* court dismissed any reading of *Simmons* that suggested any different analysis of consensual urine tests.

In the wake of *McClain* counsel must now address the issue of whether probable cause will cure an invalid consent. The following scenarios may be helpful in examining that issue:

Admissible. A commander properly orders a urine test based on probable cause, but the relaying official asks the accused for consent under circumstances similar to the *White* or *Simmons* cases. Although the urinalysis would be inadmissible by virtue of the invalid consent, it nonetheless would be admissible because the commander properly had authorized the search.

Admissible. An official obtains a urine sample from the accused based upon invalid consent of the type seen in the *White* and *Simmons* cases. Under these circumstances, probable cause will cure the invalid consent if the commander requested the accused to consent to the urinalysis and, *but for* his belief that he had a valid consent to the test, he would have authorized the seizure of the urine based on probable cause. Apparently, this scenario falls into the category in which the court equates consent with the threat of an actual search warrant.

Inadmissible. An official obtains a urine sample from the accused based upon invalid consent. The commander, however, had no knowledge of facts amounting to probable cause, and was not involved in obtaining consent from the accused. Under these facts, an "invisible hand" could not authorize the taking of urine; therefore, probable cause cannot cure the invalid consent. This is the issue upon which the *McClain* court overruled the result in *Simmons*.

Inadmissible. A commander obtains consent from an accused under the same circumstances that occurred in *White* and *Simmons*, believing at the time that he or she does not have probable cause to order an urinalysis. Later, a court determines that sufficient evidence existed when the commander obtained the consent from the accused to authorize a seizure of urine based on probable cause. *McClain* does not specifically address this scenario, but because the *McClain* court rejected the Navy-Marine Corps court's "invisible hand" rationale, probable cause apparently will not cure this invalid consent because the commander did not decide, in his or her own thinking, that probable cause existed.

In *McClain* Judge Cox wrote that "consent obtained with threat of [a] potential search warrant or authorization" is "possibly admissible, depend[ing] on [the] circumstances."[17] The court, however, gave no examples of what a "potential" search authorization is, nor did it discuss the issue further. Rather, the *McClain* opinion cited only a single case—*United States v. Salvador*[18]—in support of its proposition.

In *Salvador* an agent of the Federal Bureau of Investigation (FBI) forcibly entered a home in which he believed two robbery suspects were present. This initial entry was without a warrant but resulted in the apprehension of the two suspects. The home belonged to the suspects' relatives, who were not present in the home at the time of the initial entry, but who returned shortly thereafter. The FBI agent advised the homeowners that he had secured the home and that he would obtain a search warrant the next morning. He further told them that they would have to spend the night in a hotel unless they wished to consent to a search of their home. After being advised that he had a right not to consent to the search, one of the homeowners signed a consent form, and the FBI agent searched the premises.[19] The Court of Appeals for the Ninth Circuit determined that the homeowner gave his consent freely and voluntarily because he was neither in custody nor "subjected to oppressive conditions."[20] The Court of Military Appeal's citation of the *Salvador* case suggests that the FBI threat to obtain a warrant in the morning—that is, a "potential" warrant—did not vitiate consent to the search. The *McClain* court, however, never addressed how the consent scenario in *Salvador* squares with the consent principles announced

[16]The commander meaningfully must explain the consequences of a voluntary, consensual urine test as opposed to an ordered test. *Id.* at 133 (citing *White*, 27 M.J. at 266).

[17]*McClain*, 31 M.J. at 133.

[18]740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

[19]*Salvador*, 740 F. 2d at 757.

[20]*Id.* at 758.

in *White* and *Simmons*. In addition, the court never explained how the facts in the *Salvador* case and a "potential" search authorization might apply to a urinalysis setting because the *McClain* case simply did not present the same factual scenario. Consequently, the issue of whether a "potential" search authorization can cure an invalid consent will have to wait until the Court of Military Appeals looks at consensual urinalysis testing again. MAJ Borch.

United States v. Aurich: The Scope of Rehabilitative Potential Opinion Questions

Rule for Courts-Martial (R.C.M.) 1001(b)(5) allows a government witness to provide an opinion about the accused's rehabilitative potential.[21] The Court of Military Appeals, however, has placed several restraints on this opinion testimony.

For example, the Court of Military Appeals has held that the opinion cannot be based solely on the seriousness of the offense.[22] Rather, the opinion must be based upon the accused's "character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated."[23]

A second Court of Military Appeals caveat is that the R.C.M. 1001(b)(5) opinion cannot be a means for urging a punitive discharge.[24] The scope of the opinion must be structured to address the issue of the soldier's rehabilitative potential to become a productive member of society.[25]

Violations of this second prohibition have taken many forms.[26] The most obvious error occurs when the trial counsel asks a government witness the question, "Would you like to see the accused retained in the United States Army?"[27] A more imaginative violation is the trial counsel's question, "Does the accused have the ability 'to dig himself out of the hole ... and become a good soldier?' "[28]

Somewhere along this "rehabilitative potential" spectrum is the question, "Would you like the accused returned to your unit?" Is this question permissible or does it exceed the proper scope of R.C.M. 1001(b)(5)? In *United States v. Aurich*[29] the Court of Military Appeals provided the answer.

In *Aurich* the accused's company commander testified over defense objection that he did not want the accused back in his unit.[30] In a per curiam opinion, the Court of Military Appeals decided that this form of question would only be relevant if the witness was allowed to explain fully the rationale for the answer to this question.[31] The court noted, however, that R.C.M. 1001(b)(5) does not allow for any explanations. As a result, the court wrote that "R.C.M. 1001(b)(5) contemplates one question: 'What is the accused's potential for rehabilitation?'—and one answer: 'In my opinion, the accused has _____ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.' "[32]

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[21] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(5) [hereinafter R.C.M. 1001(b)(5)]:

> (5) *Evidence of rehabilitative potential.* The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

[22] *See* United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

[23] *See* United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989).

[24] *See id.* at 305 (the purpose of R.C.M. 1001(b)(5) rehabilitative potential opinions is not to urge punitive discharges).

[25] *See Horner*, 22 M.J. at 296.

[26] *See* United States v. Stimpson, 29 M.J. 768, 770 n.2 (A.C.M.R. 1989). The Army Court of Military Review stated that "the proper question to elicit the opinion is: "In your opinion, does the accused have rehabilitative potential?"; the proper response, dictated of course by the witness'[s] opinion is 'yes' or 'no.'" *Id.*

In United States v. Freeman, 29 M.J. 865, 867 (A.F.C.M.R. 1989), the Air Force Court of Military Review elected not to provide specific advice concerning the exact form of the question. The court wrote:

> Regarding the specific form questions and answers about rehabilitation potential may or may not take, assuming a witness is properly qualified [has the proper *Ohrt* foundation], we can provide no clear cut guidance. What is important is whether the opinion testimony taken as a whole in the context of the language used, represents a genuine insight into the character and potential of the accused to be rehabilitated or, instead, simply constitutes an attempt by the witness to influence the court to return a sentence that includes a punitive discharge. In other words, we cannot say categorically that certain words of qualification in terms of potential for rehabilitation, such as "in the Air Force" or "added service" are impermissible *per se*.

[27] *See* United States v. Cherry, 31 M.J. 1 (C.M.A. 1990); *see also* United States v. Wolfe, 29 M.J. 1018 (A.C.M.R. 1990); United States v. Diamond, 30 M.J. 902 (A.F.C.M.R. 1990); United States v. Grady, 30 M.J. 911 (A.C.M.R. 1990); United States v. Stimpson, 29 M.J. 768 (A.C.M.R. 1989); United States v. Freeman, 29 M.J. 865 (A.F.C.M.R. 1989).

[28] United States v. Sells, 30 M.J. 944, 945 (A.C.M.R. 1990).

[29] 31 M.J. 95 (C.M.A. 1990).

[30] *Id.* at 98, 99.

[31] *Id.* at 96.

[32] *Id.*; *see* United States v. Wilson, 31 M.J. 91, 94 (C.M.A. 1990). In *Wilson* the court wrote:

> The two questions—"Would you want him back in your unit?" and "Do you believe he can fulfill a role anywhere in the Army?"—albeit not suggesting the character of a punitive discharge, nevertheless effectively suggest that a discharge would be suitable. They address something other than "rehabilitative potential," and we have found their preemptive use to be improper.

See also United States v. Stimpson, 29 M.J. 768 (A.C.M.R. 1989).

Although the court recognized two situations in which rehabilitative potential testimony would be admissible,[33] the court expressed their extreme disfavor of R.C.M. 1001(b)(5) evidence. The court held:

> We are of the considered opinion that commanders should rarely testify adversely about an accused based solely on that "commander's opinion" of the accused and his crime. Sending commanders into the fray, opining that they do not want an accused in their unit, is merely the flip side of suppressing favorable testimony, absent a showing of some particular relevance ... Even when a military judge might be convinced that somehow it is going to be helpful to the trier of fact ... the situation is fraught with danger of undue and unlawful influence.[34]

In a remarkably lengthy footnote, the court recommended that the government not offer rehabilitative potential opinions until rebuttal. The court wrote: "We believe it to be the rare case where it is necessary for the government to introduce such opinions unless the accused places such potential in issue."[35] In explaining that justice is best served by the government's not presenting rehabilitative potential opinions until rebuttal, the court highlighted that during the sentencing proceedings the sole issue is punishment.[36] The court provided that if an accused has rehabilitative potential, that potential should be a mitigating factor and the accused should receive a less severe sentence. On the other hand, if the accused lacks rehabilitative potential, that fact should not be used in determining if a punitive discharge is appropriate. The court once again noted[37] that a punitive discharge *is punishment* that should be adjudged only if warranted by the offenses.[38]

Trial counsel should heed the advice provided by the per curiam opinion. First, counsel should consider saving rehabilitative potential testimony for rebuttal. This is especially true in cases such as *United States v. Aurich*, in which a military judge alone, acting as special court-martial empowered to adjudge a bad-conduct discharge, tried the accused on charges of marijuana use and distribution, and in which the accused had a prior field-grade article 15 for use of marijuana. Under these circumstances, trial counsel should ask, "Why create the issue?" Instead, the prosecutor should wait until the accused places his rehabilitative potential at issue. This will prevent appellate courts from later holding that the government was urging a punitive discharge—as opposed to rebutting the accused's evidence.[39]

Second, if the government is going to offer negative rehabilitative potential evidence prior to rebuttal, the question may not exceed, "What is the accused's potential for rehabilitation?" The answer must be, "In my opinion, the accused has _____ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation."[40]

Third, if the accused offers testimony that members of an organization want the accused returned to a particular unit, then the government can prove that the defense-offered opinion "is not the consensus view of the command."[41] Under these circumstances the rebuttal can take the form of the question that the *Aurich* court did not permit as a preemptive strike.

Once the government counsel has won his or her case, the only remaining issue is sentence. As *Aurich* demonstrates, our military appellate courts are not very enamored with R.C.M. 1001(b)(5). Counsel must ask themselves, "Is it worth it?" MAJ Cuculic.

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[33] *Aurich*, 31 M.J. at 96, 97. The court wrote that this evidence would be admissible if the answer were favorable for the accused—but then, of course, the government would not be offering it—or in rebuttal.

[34] *Id.* at 97. Note that the then Judge (now Chief Judge) Sullivan would disagree with Chief Judge Everett and Judge Cox on the admissibility of this opinion. In his concurring-in-part and dissenting-in-part opinion, he wrote, "I agree that this is a valid sentencing consideration at a court-martial as a component of the accused's 'character and potential' in general... .It provides a particular insight into the accused's personal circumstances in the military context." *Id.* (Sullivan, J., concurring in part and dissenting in part). Then Judge Sullivan's only limitation on this opinion, when the witness possesses a proper basis, is that, "The commander can only give his opinion with regard to his unit, not as to all the other units in the Army of which he has no direct knowledge." *Id.* Applying the euphemism rule, the dissent appears incorrect. If a panel member listens to a commander testify that the commander does not want the accused in his unit, the panel member logically would conclude that if that commander does not want the accused in his unit, he or she surely will not want the accused in his or her unit either. The result then almost certainly would be a punitive discharge.

[35] *Id.* at 96.

[36] "A court-martial is not an administrative discharge proceeding where members are discharged for unfitness or unsuitability for continued military service." *Id.* at 97.

[37] *See Ohrt*, 28 M.J. at 305; *Cherry*, 31 M.J. at 1.

[38] *Aurich*, 31 M.J. at 97.

[39] If the accused does not introduce evidence on his rehabilitative potential, the government should rely on the other categories of R.C.M. 1001(b) evidence and argue the accused's lack of rehabilitative potential.

[40] *Aurich*, 31 M.J. at 96. Trial counsel must recognize the need to control the witness/commander who wants to "speak his mind." The energetic witness must be well-rehearsed.

[41] *Id.* at 97.

Duress and Absence Without Authority

Introduction

In the recent case of *United States v. Riofredo*[42] the Navy-Marine Corps Court of Military Review considered whether the accused was entitled to the duress defense[43] to a charge of absence without authority (AWOL).[44] The court concluded that although the threatened injury was sufficient to raise duress, the defense was not available to the accused because he had a reasonable opportunity to avoid going AWOL. As the following discussion suggests, the court's conclusion raises several important questions about how the reasonableness of the accused's actions should be properly evaluated.

The Facts in Riofredo

The accused's claims of duress grew out of his hostile relationship with his staff noncommissioned officer (NCO), Staff Sergeant (SSG) Lowery. About three weeks prior to the AWOL, SSG Lowery struck the accused and threw him across a desk into a wall.[45] The accused reported the incident to his chain of command. In response, SSG Lowery was formally counseled and a counseling entry was placed in his service record book. The reported facts in *Riofredo* do not indicate whether the accused was aware of the command's actions.

SSG Lowery assaulted the accused a second time on the day that the charged AWOL commenced. The accused was off base sitting on his motorcycle when he encountered SSG Lowery. The NCO pulled the accused off the motorcycle and threw him to the ground. The accused's face struck the pavement, breaking a tooth. The accused, feeling "threatened" and "scared of" SSG Lowery, packed his bags and left.[46] The accused explained that he departed without authority rather than reporting the assault because he "felt that it was obvious that nothing was being done" and because he "felt threatened by Staff Sergeant Lowery for trying to cause more trouble."[47]

SSG Lowery, who lifted weights, was significantly larger in stature than the accused. Also, as SSG Lowery just recently had reported to the command, the accused believed that the NCO would remain there "indefinitely."[48]

Duress Generally

The defense of coercion or duress long has been recognized under the common law.[49] Coercion was allowed as a defense as early as the fourteenth century,[50] and Blackstone specifically discussed the defense in his commentaries.[51] The Supreme Court more recently has reiterated that duress is a valid defense.[52] Duress is recognized expressly in the Model Penal Code.[53] At present, "[n]early every American jurisdiction recognizes some form of [the] duress" defense.[54]

Duress also has been long recognized under military law.[55] The defense has been applied by the Court of Military Appeals for over thirty years[56] and has been set forth in a prior version of the Manual for Courts-Martial (Manual).[57] Indeed, Colonel Winthrop discussed the defense several decades ago in connection with aiding or associating with the enemy.[58]

The 1984 Manual sets forth the duress defense as follows:

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[42] 30 M.J. 1251 (N.M.C.M.R. 1990).

[43] *See generally* R.C.M. 916(h).

[44] Uniform Code of Military Justice art. 86, 10 U.S.C. § 886 (1982) [hereinafter UCMJ].

[45] *Riofredo*, 30 M.J. at 1252.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* W. LaFave & A. Scott, Substantive Criminal Law § 5.3b (1986); 1 Wharton's Criminal Law § 51 (C. Torcia 14th ed. 1978); R. Perkins & R. Boyce, Criminal Law 1059 (3d ed. 1982). *See generally* J. Hall, General Principles of Criminal Law, ch. 12 (2d ed. 1960); G. Williams, Criminal Law, The General Part ch. 18 (2d ed. 1961); Perkins, *Compelled Perpetration Restated*, 33 Hastings L.J. 403 (1981).

[50] Anonymous, Lib. Ass. 27, f. 137, pl. 40 (1335) (the "command of a husband, without other coercion" is sufficient to excuse a wife from criminal guilt).

[51] 4 Blackstone, Commentaries *28-30.

[52] United States v. Bailey, 444 U.S. 394 (1980).

[53] Model Penal Code § 2.09 (proposed official draft 1962).

[54] 2 P. Robinson, Criminal Law Defenses 348-49 (1984). The statutory definitions, however, are not uniform. *Id.*; W. LaFave & A. Scott, *supra* note 49, at 620.

[55] Military law sometimes has confused the defenses of duress and necessity. For a discussion that contrasts these related defenses, see generally Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95, 102-08 (1988).

[56] *E.g.*, United States v. Fleming, 23 C.M.R. 7 (C.M.A. 1957); United States v. Olson, 22 C.M.R. 250 (C.M.A. 1957).

[57] *E.g.*, Manual for Courts-Martial, United States, 1969 (rev. ed.), paragraph 216*f* [hereinafter MCM, 1969].

[58] W. Winthrop, Military Law and Precedents 297 (2d ed. 1920).

Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.[59]

Accordingly, the defense of duress under military law thus has at least four elements: 1) the accused's apprehension was reasonable; 2) the apprehension was immediate and continued throughout the commission of the crime; 3) the apprehension was of death or serious bodily harm to the accused or an innocent third person; and 4) the accused had no reasonable opportunity to avoid committing the act.[60]

Applying the Defense to the Facts in Riofredo

The government in *Riofredo* claimed on appeal that the third and fourth elements of the duress had not been established.[61] The Navy-Marine court in *Riofredo* rejected the government's argument as to the third element—that the injury threatened was not of a sufficient magnitude to raise duress. The court correctly noted that "serious bodily injury"[62] is adequate to raise duress;[63] fear of death is no longer required.[64] The court observed further that serious injury already had been inflected upon the accused by SSG Lowery, and thus implied that the accused reasonably could apprehend receiving another serious injury from that NCO in the future. Accordingly, the court found that the third element of the defense had been satisfied.

On the other hand, the court concluded that the fourth element of the defense—that the accused had no reasonable opportunity to avoid committing the act—had not been satisfied. As the Court of Military Appeals observed in *United States v. Jemmings*,[65] "The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves."[66] Thus, in *United States v. Campfield*[67] the court held that an accused was not entitled to the duress defense to AWOL because he unreasonably failed to avail himself of an opportunity to avoid the crime by reporting a threatened assault to his chain of command.

When the chain of command is unresponsive to such reports, however, the accused's failure to make a report will not disallow duress. In *United States v. Roberts*[68] the accused went AWOL because she feared receiving injuries during an "initiation ceremony."[69] The court wrote

> the immediate chain of command was not responsive to [the accused's] previous allegations of physical and verbal sexual harassment. Consequently,

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[59] R.C.M. 916(h). Although the defense is styled "duress or coercion," when coercion is denominated as a distinct defense—as opposed to broad concept—it generally refers to the antiquated defense available to a wife who is commanded by her husband to violate the law. *See generally* R. Perkins & R. Boyce, *supra* note 49, at 1062; W. LaFave & A. Scott, *supra* note 48, at 625-26; *see also* 2 P. Robinson, *supra* note 54, at 177(h). Accordingly, the term "duress" is used exclusively in this note.

[60] Arguably, the duress defense has a fifth element, that is, a nexus must exist between the threat and the crime committed. *See* United States v. Barnes, 12 M.J. 779, 780 (A.C.M.R. 1981).

[61] This is how the appellate court characterized the substance of the government's contentions. The court, however, did not speak in terms of elements of the defense.

[62] R.C.M. 916(h).

[63] *Riofredo*, 30 M.J. at 1253 (citing United States v. Roby, 49 C.M.R. 544 (C.M.A. 1975) (fear of a beating), and United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982) (an initiation)).

[64] Indeed, the scope of duress may have been expanded by decisional authority so that the defense is raised even when the injury feared is less than serious. Although the "initiation" threatened in *Roberts* was clearly abusive and disgusting, it may not have risen to the level of "serious bodily injury" contemplated by the Manual. *See generally* MCM, 1984, part IV, para. 54c(4)(a)(iii) (defining "grievous bodily harm"). The anticipated initiation had two aspects: 1) the person to be initiated is either hung upside down or forced to bend over, his pants are removed, and printer's ink is spread on his crotch; and 2) the person is tied down, his pants are removed, and grease, coffee grounds, and similar material is forced into his "seat" with a grease gun. *Roberts*, 14 M.J. at 672. If *Roberts* represents an expansion of the defense to include a threatened injury that is less than "serious," that expansion would not be unprecedented. For example, the 1984 amendments to the Manual enlarge the scope of the duress defense to include threats of sufficient magnitude directed toward *any innocent person*, and not just to the accused. *See* R.C.M. 916(h). The former rule allowed the defense only when the accused was personally threatened. MCM, 1969, para. 216*f*. The change in the 1984 Manual is based upon decisional law that had extended the defense to include threats to the accused's family and others. *See* United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976) (duress defense available when accused's children were threatened); United States v. Pinkston, 39 C.M.R. 261 (C.M.A. 1969) (threat against fiancee and illegitimate child raises the defense of duress).

[65] 1 M.J. 414 (C.M.A. 1976).

[66] *Id.* at 418.

[67] 17 M.J. 715 (N.M.C.M.R. 1983).

[68] 14 M.J. 671 (N.M.C.M.R. 1982).

[69] *See supra* note 64.

> even if [the accused] had reported the imminent threat of the initiation to her commanding officer, she could not have prevented the initiation. We conclude that she did not have a reasonable opportunity to avoid the unauthorized absence without subjecting herself to the initiation.[70]

Citing *Campfield* and *Roberts*, the court in *Riofredo* rejected the accused's argument that he could not have reasonably avoided going AWOL because of a fear of further serious assaults. Specifically, the court rejected the accused's contention that staying and reporting the second assault should not have been reasonably required of him, because reporting the first assault did not prevent the second attack.[71] The court responded that the chain of command in *Riofredo* did react swiftly and appropriately to the accused's report of the first assault.[72] The court thus concluded that "there was a reasonable expectation that the chain of command would have taken further action against Staff Sergeant Lowery had [the accused] reported the second assault and that the action taken would have precluded the occurrence of additional assaults."[73]

The court's opinion in *Riofredo* does not make clear, however, whether the accused was aware that the chain of command had responded in any manner to his report of the first assault. Assuming that the accused was not aware of the command's previous response, he reasonably might have concluded that the command would be of no assistance in protecting him from further serious injury at the hands of SSG Lowery regardless of whether he made another report. In this regard, the reasonableness of the accused's decision to go AWOL should be measured in the context of what he knew or reasonably believed at the time of his decision; constructive or imputed knowledge should have no place in assessing the reasonableness of the accused's actions. If it would have appeared to a reasonable person[74] in the accused's position[75] that the command had not and would not respond effectively to any future reports, then the immediacy element of duress would be satisfied without the accused making another apparently futile report. In other words, the accused might be entitled to duress for his initial decision to go AWOL, even if the command responded effectively to the accused's earlier report, depending upon what the accused knew and reasonably believed.

A second issue regarding the immediacy element in *Riofredo* concerns the length of the AWOL. The accused was convicted of being AWOL for eight-and-one-half months.[76] Therefore, even if his initial decision to depart without authority satisfied the immediacy requirement for duress, it seems unlikely that the requisite immediacy could have lasted for over 250 days.[77] A conclusion that the accused initially was entitled to duress, but ceased to be entitled to the defense at a later time during the AWOL, presents difficult factual questions regarding the point at which the potential harm ceased to be sufficiently immediate for purposes of the defense.[78] Precise line-drawing in this context is doubtful.

Conclusion

As *Riofredo* illustrates, duress is a complex and evolving defense. Practitioners faced with its potential application, especially with respect to AWOL and related offenses, should become familiar with its components and limitations. *Riofredo* provides a useful discussion of many aspects of the defense when applied to such crimes. It also leaves several important issues unresolved. MAJ Milhizer.

Mistake of Drug is Not Exculpatory

Two years ago, in *United States v. Mance*,[79] the Court of Military Appeals held that for an accused to be guilty of wrongful possession or use of a controlled substance,[80] he must *knowingly* possess or use the controlled substance.[81] The court explained further that

> for possession or use to be "wrongful," it is not necessary that the accused have been aware of the precise identity of the controlled substance, so long as he is aware that it is a controlled substance. For example, if he believes he possesses cocaine when, in fact, he possesses heroin, he could be convicted of wrongful possession of heroin because he had "knowledge" adequate to establish wrongfulness.[82]

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[70] *Roberts*, 14 M.J. at 672.

[71] *Riofredo*, 30 M.J. at 1253.

[72] *See id.* at 1253 n.1 (discussing the lasting adverse impact of a counselling entry on an NCO's military career).

[73] *Id.* at 1253.

[74] That is, a person of ordinary fortitude and courage. *See* United States v. Logan, 47 C.M.R. 1 (C.M.A. 1973).

[75] The term "accused's position" includes what the accused knew or reasonably believed had been done in response to his report of the first attack.

[76] *Riofredo*, 30 M.J. at 1251.

[77] *But see Roberts*, 14 M.J. at 674 (immediacy requirement for duress satisfied for 273-day AWOL because of accused's continuing fear of being assaulted aboard her ship, even though accused would not have been returned to same ship after 180 days of AWOL had passed).

[78] This approach also presents a difficult legal question regarding whether a lesser period of AWOL can be found under article 86 if the initial date, as alleged in the specification, is not correct because of duress. Whether AWOL is a continuing offense for these purposes is beyond the scope of this note. *See generally* TJAGSA Practice Note, *Is Absence Without Leave a Continuing Offense?*, The Army Lawyer, Nov. 1988, at 37.

[79] 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988).

[80] UCMJ art. 112a.

[81] *Mance*, 26 M.J. at 253-54.

[82] *Id.* at 254 (footnote omitted).

The maximum punishments for possession and use of cocaine and heroin are identical.[83] Accordingly, the court in *Mance* did not address expressly whether an accused's mistake as to the nature of the controlled substance he possessed or used would be exculpatory, when the controlled substance intended to be possessed or used by the accused was "less serious" than the substance actually involved.

This was the situation presented to the Court of Military Appeals in *United States v. Myles*.[84] Based upon a positive urinalysis test result, the accused in *Myles* was convicted of wrongful use of cocaine.[85] He unsuccessfully defended on the basis that marijuana cigarettes, which he knowingly smoked, had been laced with cocaine without his knowledge.[86] As the marijuana purportedly used by the accused totalled less than thirty grams, the maximum punishment to confinement faced by the accused for the marijuana offense he intentionally committed was substantially less than the cocaine offense of which he was convicted.[87]

In *United States v. Carr*[88] the Court of Military Appeals concluded that an accused charged with rape[89] is entitled to a mistake of fact defense[90] if he had an honest and reasonable belief that the victim consented, even if the accused was otherwise guilty of adultery.[91] The court observed that "it would be whimsical to let guilt or innocence of rape hinge on the marital status of one of the participants."[92] The Court of Military Appeals nonetheless found in *Myles* that the difference in the maximum punishment for marijuana and cocaine offenses was not exculpatory. The court wrote that, "in our view, this variation in the maximum punishments prescribed by the President for use of controlled substances does not alter the basic principle that the identity of the controlled substance ingested is not important in determining the wrongfulness of its use."[93] This result is consistent with earlier military decisional law applying the mistake of fact defense to drug offenses[94] and other crimes.[95] MAJ Milhizer.

Fleeing the Scene of an Accident

In *United States v. Harris*[96] the Army Court of Military Review considered the scope of the offense of fleeing the scene of an accident as prohibited by the Uniform Code of Military Justice. As *Harris* indicates, this crime does not occur in all circumstances involving accidents that cause property damage or personal injury.

Although the reported facts in *Harris* are sketchy, the appellate court did note that the accused lost control of his car while driving on a highway, causing it to careen over an embankment and become involved in a collision.[97] According to the court, the only property damage of any "significance" was to the accused's car. The only injuries resulting from the accident were suffered by a passenger in the accused's vehicle. The accused later left the scene of the accident without notifying the authorities.

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[83] The maximum punishment for possession and use of either cocaine or heroin is a dishonorable discharge, total forfeitures, and confinement for five years. MCM, 1984, part IV, para. 37e(1).

[84] 31 M.J. 7 (C.M.A. 1990).

[85] *Id.* at 7.

[86] *Id.* at 8. The opinion of the Air Force Court of Military Review below focused on whether the military judge correctly excluded the proffered testimony of a defense expert. United States v. Myles, 29 M.J. 589 (A.F.C.M.R. 1989). The expert would have testified that marijuana cigarettes commonly are laced with cocaine in the area of the accused's offense; and that the user of a laced marijuana cigarette might not be able to detect the presence of cocaine. All the judges below concluded that the military judge erred in excluding the testimony, but a majority found that the error was not prejudicial. *Id.* at 592. The Court of Military Appeals agreed that the judge erred but that the accused was not prejudiced. *Myles*, 31 M.J. at 9.

[87] The maximum punishment to confinement for wrongful possession or use of less than 30 grams of marijuana is two years. MCM, 1984, Part IV, para. 37e(1)(b). The maximum punishment to confinement for wrongful possession or use of cocaine is five years. *Id.*, Part IV, para. 37e(1)(a). The accused in *Myles* was sentenced, *inter alia*, to six months of confinement. *Myles*, 31 M.J. at 7.

[88] 18 M.J. 297 (C.M.A. 1984).

[89] UCMJ art. 120; *see* MCM, 1984, Part IV, para. 45.

[90] *See generally* RCM 916(j).

[91] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 62.

[92] *Carr*, 18 M.J. at 301.

[93] *Myles*, 31 M.J. at 9-10 (footnote omitted).

[94] United States v. Vega, 29 M.J. 892, 893 (A.F.C.M.R. 1989); *see also* United States v. Coker, 2 M.J. 304 (A.F.C.M.R. 1976); United States v. Anderson, 46 C.M.R. 1073 (A.F.C.M.R. 1973).

[95] *E.g.*, United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R.), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973) (belief that homicide victims were detained prisoners of war (PWs) rather than noncombatants did not operate as a defense to murder, because killing PWs constituted same crime).

[96] 30 M.J. 1150 (A.C.M.R. 1990).

[97] *Harris*, 30 M.J. at 1151.

Based upon these circumstances, the accused pleaded guilty, *inter alia*, to fleeing the scene of an accident.[98] He was convicted of this offense pursuant to his pleas.[99]

The 1984 Manual sets forth six elements of proof for the offense of fleeing the scene of an accident when the accused is the driver of the vehicle:

> (1) That the accused was the driver of the vehicle;
>
> (2) That while the accused was driving the vehicle it was involved in an accident;
>
> (3) That the accused knew the vehicle was involved in an accident;[100]
>
> (4) That the accused left the scene of the accident without [providing assistance to the victim who had been struck (and injured) by the said vehicle] (or) [providing identification];
>
> (5) That such leaving was wrongful; and
>
> (6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[101]

The elements as reflected in the Manual do not specify the type of damage or injury required for this offense.

Several years earlier, in *United States v. Seeger*,[102] the Air Force Court of Military Review addressed a situation similar to the one in *Harris*. The accused in *Seeger* had been convicted of fleeing the scene of an accident. The only significant damage was to the vehicle the accused was driving, and the sole injury was to a passenger in the accused's vehicle.[103] The Air Force court looked to several civilian statutes and authorities pertaining to "hit and run" drivers, focusing principally on the pertinent provisions of the District of Columbia Code.[104] The court concluded that the purpose of these statutes was to discourage and punish "hit and run" drivers; that is, drivers "who would leave the scene of an accident in which [they were] involved without making [their] identity known in order to escape any civil or criminal liability that could be imposed for injury or property damage caused to another."[105] Indeed, the court wrote that it would be an "absurdity" to find that fleeing the scene of an accident could occur when a driver left the scene of an accident, when only his property was damaged, without first making his identity known to himself.[106] The court continued that it "would be equally as absurd to require the driver to make his identity known to an injured passenger in his own vehicle when the driver's time would best be spent seeking medical aid for the passenger."[107]

The 1984 Manual seeks to incorporate the rationale of *Seeger* in its discussion of the military offense of fleeing the scene of an accident.[108] The Manual provides that the crime "covers 'hit and run' situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle."[109]

Although the Manual's language suggests that any damage to the property of another, however slight, is sufficient to support a charge of fleeing the scene of an accident, the court in *Harris* seems to interpret the offense as requiring *significant* damage to property other than the accused's vehicle.[110] The court's interpretation of the damage requirement in *Harris* is consistent with Congress's formulation of the civilian counterpart for fleeing the scene of an accident, which is favorably quoted by the court in *Seeger*.[111]

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[98] UCMJ art. 134.

[99] *Harris*, 30 M.J. at 1150.

[100] The Manual explains that "[a]ctual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence." MCM, 1984, Part IV, para. 82c(2). The analysis to the Manual indicates that this paragraph is based on United States v. Eagleson, 14 C.M.R. 103, 110 (C.M.A. 1954) (Latimer, J., concurring in the result). MCM, 1984, Part IV, para. 82c analysis, at A21-101. The analysis explains further that under current practice, actual knowledge is treated as an element of the offense rather than as an affirmative defense. *Id.* (citing United States v. Waluski, 21 C.M.R. 46 (C.M.A. 1954)); *cf.* United States v. Mance, 26 M.J. 244 (C.M.A. 1988) (for wrongful use and possession of controlled substance, accused's knowledge of the character of the substance is an element of proof, rather than absence of knowledge being an affirmative defense).

[101] MCM, 1984, Part IV, para. 82b(1). Separate but related elements of proof apply if the accused is tried under the theory that he was the senior passenger in the vehicle. *Id.*, Part IV, para. 82b(2). Further, the Manual provides that a "passenger other than a senior passenger may also be liable" under article 134. *Id.*, Part IV, para. 82c(3) (citing *id.*, Part IV, para. 1).

[102] 2 M.J. 249 (A.F.C.M.R. 1976).

[103] *Id.* at 250.

[104] 40 D.C. Code Ann. § 609 (1981), *cited in Seeger*, 2 M.J. at 252.

[105] *Seeger*, 2 M.J. at 253.

[106] *Id.* at 252.

[107] *Id.*

[108] *See* MCM, 1984, Part IV, para. 82c(1) analysis, at A21-101.

[109] *Id.*, Part IV, para. 82c(1).

[110] *Harris*, 30 M.J. at 1151.

[111] *Seeger*, 2 M.J. at 252 (citing 40 D.C. Code Ann. 609 (1981), which requires "substantial damage").

The court's failure in *Harris* to apply the Manual's seemingly more expansive standard regarding the degree of damage required may only be an oversight. If deliberate, however, the decision was not unprecedented. The military's appellate courts long have declined to recognize presidential attempts in the Manual to define the scope of offenses and defenses.[112] Of course, guidance in the Manual regarding the scope of an offense has been found to be useful in reflecting Congress's intent, especially when the offense at issue is charged under article 134.[113] In any event, misconduct falling short of an enumerated article 134 offense—such as fleeing the scene of an accident—may nonetheless constitute a disorder or neglect under the first two clauses of the general article.[114] MAJ Milhizer.

Instructions on Cross-Racial Identification—A Clarification

In *United States v. Thompson*[115] the United States Court of Military Appeals clarified when an instruction on cross-racial identification is required. The cross-racial identification instruction states:

> In this case the identifying witness is of a different race than the accused. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness' testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the accused's race that he or she would not have greater difficulty in making a reliable identification.[116]

The Court of Military Appeals previously had approved the use of this instruction but gave no criteria for giving it.[117] The court, however, already had announced the criteria for giving a generalized instruction on eyewitness identification—that is, when the instruction is requested and when identification is a primary issue in the case.[118]

In *Thompson* the court held that "[t]he necessity for giving [the cross-racial identification instruction], however, is likewise determined by whether defense counsel requests it and whether *cross-racial* identification is a "primary issue" in the case."[119] What is more important for the practitioner is that the court expressly rejected the notion that a cross-racial identification instruction is required in every case in which the eyewitness and the accused are of different races. "[T]he mere happenstance that an eyewitness and the accused are not of the same race does not make cross-racial identification a primary issue or necessitate a special instruction."[120] In *Thompson* the robbery victim was of a different race, but she had observed the accused for seven to ten minutes during the offense, had no difficulty in selecting the accused from other members of his race at line-ups, and had discounted several members of the accused's race before identifying him.[121] If the defense really desired an instruction on cross-racial identification, the court implied that the defense counsel should have elicited testimony from the eyewitness about her difficulty in identifying the accused in the line-ups, her difficulty in distinguishing among members of the same race, or her wavering in the identity of the accused.[122] In *Thompson*, however, the evidence did not show any weakness in the victim's identification other than her failure to notice that the accused had a gold-capped front tooth. A court, therefore, will require some factual predicate to exist, other than the mere differences in race between the eyewitness

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[112] *E.g.*, United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not include fleeing apprehension, despite language in Manual to contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by language in Manual designed to eliminate defense of partial mental responsibility); United States v. Jackson, 26 M.J. 377 (C.M.A. 1988) (scope of false official statement offenses under military law expanded to include false or misleading responses given during official questioning of accused, even when accused did not have an official duty to account, despite language in Manual requiring that duty); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (Everett, C.J.) (military law must recognize a defense of voluntary abandonment as to criminal attempts, even though Manual's failure to recognize that defense could indicate an intent by President to reject it); United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (drug distribution can occur without physical transfer of the drug, despite language in Manual that suggests otherwise). *See generally* UCMJ arts. 36, 56; United States v. Johnson, 17 M.J. 252 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

[113] *E.g.*, United States v. Jeffress, 28 M.J. 409 (C.M.A. 1989). In *Jeffress* the Court of Military Appeals considered the scope of kidnapping under the so-called "pure" article 134 theory. In deciding whether incidental movement or detention is sufficient for kidnapping under this theory of prosecution, the court wrote "if the President, who is the Commander-in-Chief, concludes that certain conduct is not in itself service-discrediting or contrary to good order and discipline, we assume that Congress would be reluctant for that conduct to be prosecuted as a violation of the first two clauses of Article 134." *Id.* at 413. *See generally* TJAGSA Practice Note, *The Military's Anomalous Kidnapping Laws*, The Army Lawyer, Jan. 1989, at 32.

[114] *E.g.*, United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (recklessly endangering another by engaging in unprotected, unwarned sexual intercourse while knowingly infected with AIDS virus and knowing that that activity risks transmission of disease). *See generally* MCM, 1984, Part IV, para. 60c(6)(c)

[115] 31 M.J. 125 (C.M.A. 1990).

[116] Dep't of Army, Pam 27-9, Military Judges' Benchbook, para. 7-7.1 (15 Feb. 1989) [hereinafter Benchbook].

[117] United States v. McLaurin, 22 M.J. 310, 312 n.2. (C.M.A. 1986).

[118] 22 M.J. at 312; 31 M.J. at 131. For the general instruction on eyewitness identification, *see* Benchbook, para. 7-7 and United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972).

[119] 31 M.J. at 128.

[120] *Id.* at 129.

[121] *Id.* at 128.

[122] *Id.*

and the accused, before the judge must give a cross-racial identification instruction. LTC Holland.

Instructions on Aggravated Assault as a Lesser-Included Offense to Murder

In *United States v. Emmons*[123] the United States Court of Military Appeals considered the issue of what circumstances are necessary to require a judge to give instructions on aggravated assault as a lesser-included offense of unpremeditated murder. The accused in *Emmons* pleaded not guilty to a charge of unpremeditated murder. The government and the defense stipulated that the victim died from a gunshot wound to the head. The defense did not dispute the evidence that the pistol, which caused the wound to the victim's head, discharged while being held by the accused. The defense case consisted of testimony that reflected that the accused did not know that the pistol was loaded; however, the government used the accused's confession in its case-in-chief to show that the accused believed the pistol was loaded. When the case was ready to go to the court members for their deliberations on findings, the military judge held an article 39a session to cover instructions with counsel. The initial question raised—and the one that the Court of Military Appeals sought to answer—was what lesser-included offenses were raised by the evidence.

The rule generally accepted in the military is that instructions on lesser-included offenses are necessary only when they reasonably have been raised by the evidence.[124] In *Emmons* because no factual dispute as to the cause of the victim's death existed, the evidence seemingly mandated instructions only on the lesser-included offenses that constituted some type of homicide offense—that is, murder, manslaughter, or negligent homicide.[125] The military judge gave these instructions; however, over defense objection, the judge also gave an instruction on aggravated assault with a loaded firearm. The court members convicted the accused of aggravated assault. On appeal, the government conceded that the judge erred in giving the aggravated assault instruction.

Judges Cox and Sullivan found the government's concession not to be determinative and held that the court members properly could convict Airman First Class Emmons of the aggravated assault.[126] Because aggravated assault does not require that death or grievous bodily harm actually be inflicted and the intentional brandishment of a loaded firearm essentially constitutes an offer-type aggravated assault, Judge Cox thought that the court members "could rationally return a verdict of guilty to aggravated assault even though the victim was killed."[127] Judge Sullivan also agreed that the court members rationally could have deduced from the evidence that Emmons only intended an offer-type assault.[128] While recognizing the existence of authority that could be construed as precluding instructions on, and findings of, guilty on aggravated assault when death occurs from the accused's actions,[129] the two judges cited more recent authority from the federal circuits and commentary that indicated that no per se rule against this practice should exist.[130] Although Chief Judge Everett believed the military judge erred in giving the instruction on aggravated assault, he saw no reason for setting aside the finding of guilty, stating that "[Emmons] is no less guilty of aggravated assault merely because he was also guilty of a greater crime with which he was charged."[131]

Having decided to give the instruction on aggravated assault as a lesser-included offense, the military judge then was faced with when to give the instruction in the relative order of other lesser included offenses. R.C.M. 921(c)(5) indicates that if the members reach a not guilty finding on the charged offense, they are to vote on each lesser-included offense in order of severity beginning with the most severe. The issue then revolves around the definition of "severity"—that is, does R.C.M. 921 mean instructing based upon the severity of *punishment* or the severity of the *elements* of the offenses? If one considers severity of punishment as determinative, aggravated assault with a loaded firearm is more severe than involuntary manslaughter or negligent homicide. If, however, one considers severity of the elements determinative, aggravated assault should be instructed last. The majority

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[123] 31 M.J. 108 (C.M.A. 1990).

[124] *See* United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985); United States v. Jackson, 12 M.J. 163 (C.M.A. 1981).

[125] *Emmons*, 31 M.J. at 114 (Everett, C.J., concurring in the result).

[126] *Id.* at 112-14.

[127] *Id.* at 112.

[128] *Id.* at 114 (Sullivan, J., concurring).

[129] United States v. Schreiber, 18 C.M.R. 226 (C.M.A. 1955); United States v. Davis, 10 C.M.R. 3 (C.M.A. 1953); United States v. Craig, 10 C.M.R. 148 (C.M.A. 1953).

[130] *Emmons*, 31 M.J. at 112, 113.

[131] *Id.* at 116 (Everett, C.J., concurring in the result).

found no error in the judge instructing the members based on the severity of punishment as established by the President in the Manual for Courts-Martial.[132] Chief Judge Everett, on the other hand, gives an interesting analysis of the situation, by indicating that "Congress, not the President, defines the elements of crimes and thereby determines which offenses are lesser-included ... our task of determining which offenses are lesser-included should be performed with deference to the Uniform Code of Military Justice, rather than to the maximum punishments authorized by the President."[133] While the *Emmons* case represents a winner for the prosecution, the defense can find plenty of ammunition in Chief Judge Everett's separate opinion to argue that a similar instruction should not be given in the future, and if given, its order of severity should be based upon the elements of the offenses and not the severity of punishment. LTC Holland.

Legal Assistance Items

Faculty members of The Judge Advocate General's School have prepared the following notes to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Attorneys in the field also can adapt them for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; authors should sent submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Veterans Law Note

Reserve Reemployment Rights

Reserve component soldiers called to active duty during Operation Desert Shield should not have to worry about jobs they left behind, thanks to the Veterans Reemployment Rights Law (VRRL).[134] This legislation, enacted originally in 1940 as part of the Universal Military Training and Service Act, and most recently amended in 1986, provides job protection for Reservists and National Guard members who leave full-time employment to enter active duty. The VRRL applies to all federal, state, and local governments, and to all private employers as well.

The VRRL protects Reservists and National Guard members who have either voluntarily or involuntarily left civilian employment to enter active duty.[135] The Reservist or National Guard member need not request a leave of absence before departing for active duty.[136] Employees who resigned or were discharged prior to entry into active duty, however, are not entitled to reemployment protection under the VRRL.[137]

The Reserve Component member must satisfy five eligibility criteria the VRRL will entitle him or her to reemployment. First, the job protection afforded under the VRRL does not apply to temporary positions held by Reservists prior to entry on active duty. The test used by most courts to determine whether a position was temporary is whether the Reservist had a reasonable expectation that employment would be continuous and for an indefinite time.[138] The fact that the Reservist was working under a contract of limited duration does not necessarily require a finding that the job was temporary.[139] Courts generally have concluded, however, that seasonal employment is not permanent employment and will not trigger protections under the VRRL.[140]

Second, returning Reserve component members must be qualified to perform the duties of the position to which they seek to return.[141] Employers may not, however, raise a defense based upon the employee's lacking qualifications if the grounds for disqualification existed prior to entry on active duty and the employer failed to communicate that to the veteran.[142]

Third, veterans must have served satisfactorily while on active duty.[143] Returning veterans, whom the military did not release from active duty under honorable conditions, will not be entitled to reemployment rights.[144] Moreover, an employer may not refuse to reemploy a

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[132] *Id.* at 113.

[133] *Id.* at 114 (Everett, C.J., concurring in the result).

[134] 38 U.S.C. § 2021 (1988). A comprehensive discussion of this law and case law interpreting it appears at Annotation, *Re-Employment of Veterans*, 29 A.L.R. 2d 1279 (1953).

[135] Courts consistently have held that the VRRL protects those who entered the military on their own free will. *See, e.g.*, Boston & M. R. Co. v. Hayes, 160 F.2d 325 (1st Cir. 1947); Rudisill v. Chesapeake & O. R. Co., 167 F.2d 175 (4th Cir. 1948).

[136] Reservists and National Guardsman must request a leave of absence, however, when leaving the job to begin active duty for training or inactive duty for training.

[137] *See* Edwards v. Capital Airlines, 176 F.2d 755 (D.C. Cir.), *cert. denied*, 338 U.S. 885 (1949); Carney v. Boston & M. R. Co. 82 F. Supp. 366 (D. Mass. 1949).

[138] *See, e.g.*, Moe v. Eastern Airlines, 246 F.2d 215 (5th Cir.), *cert. denied*, 357 U.S. 936 (1957), *reh'g denied*, 358 U.S. 858 (1958).

[139] Martin v. Roosevelt Hosp., 426 F.2d 155 (2d Cir. 1970); Williams v. Walnut Park Plaza, 68 F. Supp. 957 (E.D. Pa. 1946).

[140] *See* Bochterle v. Albert Robbins, Inc., 165 F.2d 942 (3d Cir. 1947); Unruh v. North Am. Creameries, Inc., 70 F. Supp. 36 (D.N.D. 1947).

[141] *See* Bryan v. Griffin, 166 F.2d 748 (6th Cir. 1948). *See generally*, Annotation, *supra* note 134.

[142] *See* Anderson v. Schouweiler, 63 F. Supp. 802 (D. Idaho 1945). *But see* John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir. 1947) (error for court to exclude evidence that veteran drank heavily in former position with company).

[143] Browning v. General Motors Corp., 387 F. Supp. 985 (S.D. Ohio 1974).

[144] 38 U.S.C. § 2021(a) (1988).

veteran who possesses an honorable discharge certificate by claiming that the military improperly characterized the quality of service.

The fourth eligibility criteria requires that the veteran serve on active duty for less than four years. This period, however, may expand to five years if the period of extension beyond four years is at the request and convenience of the government.

To satisfy the fifth and final criteria, Reservists and National Guardsmen must apply to their civilian employer within ninety days of their termination from active duty.[145] For Reservists and National Guard members returning from initial active duty for training of twelve consecutive weeks or more, the application period is thirty-one days.[146]

Returning veterans must apply for reemployment as soon as possible after release from active duty. This is extremely important because courts have held that the veteran has the burden of proving that he or she made the application within the statutory time limit, and that the employer denied the veteran reemployment benefits under the VRRL, when a conflict in evidence on the issue exists.[147] Moreover, courts have denied benefits to veterans who merely made casual inquiries about their former positions or the availability of jobs.[148]

Even if the veteran has met all five criteria, employers may avoid liability for failure to reemploy returning veterans if reemployment would be unreasonable under all of the facts and circumstances.[149] The purpose of this judicially-created defense is to protect the employer from creating useless jobs for returning reservists. This defense requires more than a mere showing that reinstating the returning Reservist would be inconvenient or undesirable.[150] The generally prevailing view is that a decline in business is not sufficient to deny reemployment.[151] Several courts, however, have concluded that adverse economic circumstances are a legitimate basis for an employer to deny reemployment.[152] The private employer carries the burden of proving that circumstances have made reemployment unreasonable.[153]

If a veteran makes an application within the prescribed time limit and meets all of the other criteria, the employer must reinstate the returning veteran to a position of like seniority, status, and pay.[154] In computing seniority, employers must treat veterans as though they had employed them continuously during the period of active service.[155] This concept, referred to as the "escalator principle," means that all of the reservists' rights, including all "perquisites of seniority" move forward as if the veteran never left employment.[156]

A frequently litigated issue is whether the VRRL entitles the returning veteran to have the amount of time in service included in the computation of vacation benefits. Several courts have taken the view that vacation pay rights do not fall within the term "other benefits" and that the VRRL, therefore, does not protected them.[157] Under this view, the VRRL does not require employers to pay returning veterans for vacation benefits that accrued during the period of active service. Other courts have held, however, that vacation rights are benefits protected under the VRRL.[158] The best approach is to consider vacation pay as a perquisite of seniority only if the employer bases it on longevity rather than on work actually performed.[159] The VRRL protects other fringe benefits, such as retirement pay and promotions, only if the employer clearly intended them to accrue automatically

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[145] *Id.* § 2021(a).

[146] Reservists and National Guard members returning from other types of military training must report back to their employer for the next scheduled work period after their return home.

[147] Lacek v. Peoples Laundry, 94 F. Supp. 399 (M.D. Pa. 1950).

[148] *See id.*; Shadle v. Superwood Corp., 858 F.2d 437 (8th Cir. 1988). *But cf.*, Borseth v. Lansing, 61 N.W.2d 132 (Mich. 1953) (inquiry about reinstatement held sufficient to constitute application).

[149] For a general discussion of this defense and a summary of cases in which it arose, see generally Annotation, *supra* note 134.

[150] Levine v. Berman, 161 F.2d 386 (7th Cir.), *cert. denied*, 332 U.S. 792 (1947); Smith v. Lestershire Spool & Mfg. Co., 86 F. Supp. 703 (N.D.N.Y. 1949).

[151] Van Doren v. Van Doren Laundry Serv., 162 F.2d 1007 (3d Cir. 1947); Allyn v. Abad, 167 F.2d 901 (3d Cir. 1948).

[152] Rusterholtz v. Titeflex Inc., 166 F.2d 335 (3d Cir. 1948); Maloney v. Chicago, B & Q. R. Co., 72 F. Supp. 124 (W.D. Mo. 1947).

[153] *See* Watkins Motor Line Inc. v. De Galliford, 167 F.2d 274 (5th Cir. 1948).

[154] Alabama Power Co. v. Davis, 431 U.S. 581 (1977).

[155] Accardi v. Pennsylvania R. Co., 369 F.2d 805 (2d Cir. 1966).

[156] Alabama Power Co. v. Davis, 431 U.S. 581 (1977). The "escalator principle" is the subject of at least three law review articles. *See* Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45 (1973); Haggart, *Veterans' Re-employment Rights and the "Escalator Principle"*, 51 Boston U. L. Rev. 539 (1971); Ross, *Returning Veterans' Rights To Fringe Benefits After* Foster v. Dravo Corporation, 68 Mil. L. Rev. 55 (1975).

[157] Li Pani v. Bohak Corp. 546 F.2d 487 (2d Cir. 1976); Morton v. Gulf M. & O. R. Co., 405 F.2d 415 (8th Cir. 1969).

[158] MacLaughlin v. Union Switch & Signal Co., 166 F.2d 46 (3d Cir. 1948); Woods v. Glen Alden Coal Co., 73 F. Supp. 871 (M.D. Pa. 1947).

[159] Foster v. Dravo Corp. 200 U.S. 92 (1975), *remanded*, 395 F. Supp. 536 (W.D. Pa. 1976).

as a function of continued association with the employer.[160]

The VRRL specifically provides that an employer may not deny a member of a Reserve component any other "incident or advantage of employment."[161] Thus, the VRRL clearly entitles returning veterans to fringe benefits such as overtime pay and medical insurance coverage immediately upon returning to their civilian employment.[162]

Veterans do not waive their rights under the VRRL by demanding higher positions than the law entitles them to[163] or by accepting alternative employment after their employers have denied their applications for reinstatement.[164] Veterans may, however, waive their rights under the VRRL by contract. A waiver is enforceable against a veteran if the veteran was fully aware of his or her rights under the VRRL and the language of waiver is clear and unambiguous.[165]

Once reemployed, the VRRL protects veterans from discharge without cause for up to one year. Similarly, the VRRL protects Reservists and National Guardsmen returning from initial active duty for training from discharge without cause for six months. The standard "without cause" refers to the absence of any legal ground for dismissal such as lack of skill, competence, diligence, or loyalty.[166] Clearly, the commission of offenses such as theft or forgery constitutes just cause for dismissal. Courts also have found that just cause for termination within the one-year period exists in cases of employee intoxication, insubordination, frequent unexplained absences, profanity, and rudeness to customers.[167]

Returning veterans whom employers do not reinstate or who are not receiving benefits under the VRRL should first contact any office of the Veterans' Employment and Training Office, United States Department of Labor.[168] If the employer is the Federal Government, the veteran should contact the nearest Office of Personnel Management (OPM) regional office or a Federal Job Information Center. Assistance in receiving benefits may also be available from the nearest Department of Veterans Affairs office.

If the employer does not provide benefits, the veteran may file suit in the United States District Court for any district in which the employer maintains a place of business.[169] The court must expedite hearing on the matter and cannot assess fees or court costs against any person applying for benefits.[170] No statute of limitations exists for seeking judicial enforcement of the VRRL. Courts will, however, invoke the doctrine of laches to deny benefits to employees who delay bringing suit for enforcement within a reasonable time.[171] The VRRL entitles veterans, whom employers wrongly fail to reinstate, to damages for lost wages from the date of application for reinstatement.[172] In computing the amount of back pay to award, courts generally will give credit for wages received by veterans in other employment.[173]

Attorneys advising returning veterans should encourage them to make written applications for their former positions as soon as possible. Practitioners also should warn veterans not to sign any documents waiving rights under the VRRL and not to accept any employment offering less pay or seniority than their former positions. MAJ Ingold.

Survivor Benefits Note

Statute of Limitations Bars Claim for SBP Benefits

Widows claiming that the provisions of the Survivor Benefit Plan (SBP) entitles them to payments must file

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[160] Jackson v. Beech Aircraft Co., 517 F.2d 1322 (10th Cir. 1975) (retirement pay); Li Pani v. Bohak Corp., 546 F.2d 487 (2d Cir. 1976) (sick pay); Almond v. United States Steel Corp., 499 F. Supp. 786 (E.D. Pa. 1980) (promotability).

[161] 38 U.S.C. § 2021(b)(3) (1988). The VRRL does not define the phrase "incident or advantage of employment."

[162] Dufner v. Penn. Central Trans. Co., 374 F. Supp. 979 (E.D. Pa. 1974).

[163] Trusteed Funds, Inc. v. Dacey, 160 F.2d 413 (1st Cir. 1947).

[164] Leob v. Kivo, 169 F.2d 346 (2d Cir. 1948), *cert. denied*, 335 U.S. 891 (1949).

[165] Niemic v. Seattle Ranier Baseball Club, Inc., 67 F. Supp. 705 (W. D. Wash. 1946).

[166] Hoyer v. United Dressed Beef Co., 67 F. Supp. 730 (S.D. Cal. 1946).

[167] For a list of cases and a discussion of dismissal for cause, see Annotation, *What is "Cause" Justifying Discharge From Employment of Returning Servicemen Re-employed Under § 9 of the Military Selective Service Act of 1967*, 9 ALR Fed. 225 (1968).

[168] The Veterans Employment and Training Service (VETS), United States Department of Labor, is responsible for enforcing the VLLR. The national VETS telephone number is (202) 523-8611.

[169] 38 U.S.C. § 2022 (1988).

[170] *Id.*

[171] Farries v. Stanadyne/Chicago Div., 832 F.2d 374 (7th Cir. 1987) (eight years); Leonick v. Jones & Laughlin Steel Corp., 258 F.2d 48 (2d Cir. 1948) (delay of ten years); Donner v. Levine, 232 F.2d 185 (2d Cir. 1956) (delay of three years).

[172] Boston & M. R. R. v. Bentubo, 160 F.2d 326 (1st Cir. 1947); Special Serv. Co., v. Delaney, 172 F.2d 16 (5th Cir. 1949).

[173] Chernoff v. Pandick Press Inc., 440 F. Supp. 822 (S.D.N.Y. 1977); *Boston & M. R. R.*, 160 F.2d at 326.

suit against the United States within six years of their retiree-spouse's death according to a recent case. In *Hart v. United States*[174] the Court of Appeals for the Federal Circuit held that claims for Survivor Benefit Plan (SBP) payments begin accruing on the date of death and do not constitute a continuing claim that accrues each month payments are due.

In *Hart* a retired Air Force noncommissioned officer elected not to participate in the SBP Plan. The government, however, failed to notify his wife of this decision as required by law.[175] Mrs. Hart did not file a claim for benefits until eight years after her husband's death.

The United States Claims Court held that a claim for SBP benefits was a "continuing claim." Accordingly, the six-year statute of limitations did not bar Mrs. Hart's claim for those payments accruing after six years.

The Federal Circuit, however, reversed the decision of the Claims Court. A claim begins to accrue, the court reasoned, "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action."[176] The court found that Sergeant Hart's election to participate in the SBP plan was void because the government failed to notify Mrs. Hart about this decision. The SBP annuity, therefore, was payable one day after Sergeant Hart's death. Sergeant Hart's death was the last event that fixed the liability of the government and it entitled Mrs. Hart to institute action to enforce her right to payment.

The Federal Circuit rejected the lower court's characterization of the suit as a "continuing claim," noting that if it adopted that characterization the statute of limitations never would apply. The court found that, because all events necessary to bring suit occurred one day after Sergeant Hart's death, the action did not constitute a "continuing claim." Moreover, the court found that carving an exception in the case at bar would not further the public interest served by the statute of limitations—that is, to put an end to the possibility of litigation and to protect the government from having to defend suits long after events giving rise to claims had occurred. Rather, the court concluded that the statute of limitations constitutes an express limitation on the waiver of sovereign immunity.

Legal assistance attorneys should inform widows of retirees about the government's obligation to inform them of any election not to participate in the SBP. If any doubt as to the adequacy of notice exists, attorneys should strongly encourage widows to apply for SBP payments immediately. MAJ Ingold.

Soldiers' and Sailors' Civil Relief Act (SSCRA) Notes

Applicability of SSCRA to Automobile Leases

Long-term automobile leases became a popular means of obtaining personal transportation during the past decade. Like other consumers, Reserve and active component soldiers often enter into these leases. With the Desert Shield deployments, continued payments on automobile leases may be difficult or unnecessary for service members who left their cars behind. Although courts have not firmly established its applicability to automobile leases through litigation, several provisions of the Soldiers' and Sailors' Civil Relief Act (SSCRA) should provide relief to some Reserve component service members faced with continued lease payments.[177]

Section 531, title 50, United States Code Appendix, affords protection from rescission or termination of installment contracts and "leases ... with a view to purchase."[178] If a service member has made a deposit or a payment on an installment contract or a lease with a view to purchase real or personal property, only a court may approve contract termination and repossession of the property. As with many provisions of the SSCRA, the service member seeking the protection must have entered the underlying obligation *before* beginning active service. Further, the service member must have made a deposit or a payment on the obligation before active service. If the service member meets these criteria, the seller or lessor may not terminate the contract and repossess the property unless a court determines that military service is not affecting materially the service member's ability to comply with the obligation. Knowing repossession or attempts to repossess property subject to this provision without judicial approval is a misdemeanor under the SSCRA and punishable by imprisonment of up to one year.

The central issue for an attorney helping a client whom a dealer is suing for nonpayment of an automobile lease is whether or not the client entered the lease with a view to purchase the automobile.[179] An option to purchase at the conclusion of the lease may meet this requirement, particularly if the contract credits any part of the lease

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[174] Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990).

[175] 10 U.S.C. § 1448(a)(3)(A) (1982).

[176] *Hart*, 910 F.2d at 817 (citing Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988)).

[177] *See* 50 U.S.C. App. § 531 (1990) (installment contracts for the purchase of property); *id.* § 532 (mortgages of real and personal property).

[178] *Id.* § 531.

[179] If a Reserve component service member buys a car on an installment contract basis, and military service is affecting materially the ability to pay, this provision should have direct applicability.

payments toward the purchase price. If the court determines the SSCRA to be applicable to an action for failure to make payments on a car lease, it has several alternatives. Many service members likely would prefer to terminate such a lease because their cars may be of little value to them while deployed, particularly if they are single. The court may order refund of installment payments and any deposit as a condition of repossession.[180] If, however, a service member desires to retain the automobile and requests a stay of proceedings, the court may grant a stay. The duration of a stay of court proceedings under the SSCRA may run up to three months following termination of active service.[181]

If a service member wishes to initiate action seeking relief, instead of waiting for a creditor to take action for nonpayment, the SSCRA provides an alternative provision. Under section 590, if the service member enters the automobile lease before active duty and subsequently experiences difficulty making payments because of military service, he or she may apply for a stay of the obligation.[182] The court then may stay enforcement of the obligation to make lease payments during the service member's military service. Additionally, the court may continue the stay after termination of service for a period of time equal to the time in active service. If the court extends the stay for a period of time after active service ends, the discharged service member must pay all back-payments during that period. While the discharged service member is making these payments in arrears, he or she must resume making regular payments on the lease as well.

Protection from Mortgage Foreclosure

Unlike automobile leases, the courts clearly have established the protections in the SSCRA against mortgage foreclosure. Although similar to the protection against termination of installment contracts, the protection against foreclosure requires that real or personal property secure the underlying financial obligation. If 1) a service member owned the property in question before beginning active service, 2) he or she entered a mortgage or security agreement before entry on active duty, and 3) the military service is materially affecting the ability to pay, relief is available under the SSCRA. This relief may consist of a stay of the foreclosure proceedings or a decrease in payments during the period of service.[183] Other relief may include reopening a default foreclosure judgment[184] or an extension of the redemption period by an amount of time equal to the active military service.[185]

For Reserve component service members who have entered security agreements on personal property such as their automobiles, or who have entered mortgages for the purchase of real property, this provision may afford much needed relief. Used in conjunction with the six-percent limitation on interest rates,[186] it should, in many instances, ensure that Reserve component service members and their families do not suffer undue financial hardships as a result of military service. MAJ Pottorff.

Family Law Note

Can the Use of the Bankruptcy Code Avoid a Court-Ordered Division of Military Retired Pay?

Bankruptcy seeks to provide a debtor with a fresh financial start by allowing courts to discharge or forgive debts. The scope of this relief is broad because of the Bankruptcy Code's definition of debt as "liability on a claim ... whether or not such ... [claim] is reduced to judgment, ... fixed, contingent, matured, [or] unmatured ... ."[187] The existence of nine categories of financial obligations that a bankruptcy proceeding cannot discharge, however, tempers the Bankruptcy Code's policy of debt forgiveness. Included among these exceptions are debts "in the nature of alimony, maintenance, or child support."[188]

Determining what obligations are in "the nature of" alimony, maintenance, or child support is not easy for courts. The Bankruptcy Code does not define the terms "alimony," "maintenance," or "child support." Moreover, the terms assigned to the debtor's obligation by a

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[180] 50 U.S.C. App. § 533 allows a court that has stayed an action for rescission or contract termination to appoint three disinterested parties to appraise the property involved. The court then may order the party to pay the equity to the service member or his representative as a condition of rescission or contract termination.

[181] A stay under this circumstance would likely be pursuant to two provisions of the SSCRA. First, 50 U.S.C. App. § 521 allows service members to stay any action in any court during the period of service or within 60 days thereafter. In addition, 50 U.S.C. App. § 524 authorizes a stay for a period of up to three months following termination of active service.

[182] *See* 50 U.S.C. App. § 590(1)(b) (1990).

[183] *Id.* § 532(2).

[184] *Id.* § 520.

[185] *Id.* § 525.

[186] *Id.* § 526. For discussions of the six-percent cap, see Soldiers' and Sailors' Civil Relief Act Notes, *The Army Lawyer*, Oct. 1990, at 48; and Soldiers' and Sailors' Civil Relief Act Note, *The Army Lawyer*, Nov. 1990, at 49.

[187] 11 U.S.C. § 101(4), (11) (1988).

[188] *Id.* § 523(a)(5) (providing that discharge is not available for any debt owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of [the] court of record or property settlement or agreement ...").

court order of divorce, separation, or property division are not necessarily controlling. Instead, courts must determine the substance of the debt owed.[189] The absence of a federal domestic relations law further complicates the issue. Accordingly, bankruptcy courts generally must use state law to determine if a debt, regardless of its court assigned characterization, constitutes alimony, support, or maintenance.

The Uniform Services Former Spouses' Protection Act[190] (USFSPA) allows state courts to treat "disposable military retired pay"[191] as either "property solely of the [retired service] member or as property of the member and his or her spouse in accordance with applicable state law."[192] Moreover, the USFSPA entitles ex-spouses to receive directly, from a retiree's retired pay, court-ordered child support or alimony.[193] Direct payment of a retired soldier's disposable retired pay to satisfy a court-ordered division of marital property also is possible if the ex-spouse was married to the retiree for at least ten years of the retiree's retirement creditable service.[194]

Given the provisions of the USFSPA and the Bankruptcy Code, the issue of how a retired soldier can have an obligation to pay an ex-spouse a portion of his or her retired pay discharged through bankruptcy proceedings becomes important. Initially, a bankruptcy court will examine the language of the court order creating the obligation. Assuming it orders payments for either child support or alimony, the court almost certainly will not discharge the obligation.[195] This is particularly true given the definitions assigned to the terms "child support"[196] and "alimony"[197] under the USFSPA. Prospects for discharge are even lower if the retired service member previously had satisfied the purported alimony or child support obligations by direct payment to an ex-spouse to whom he had not been married during at least ten years of the retiree's retirement creditable service.[198]

The analysis is more complicated, however, if the court order purports to divide disposable retired pay as property. Unlike child support and alimony,[199] the USFSPA does not define the term "property." Therefore, a bankruptcy court possibly would assign less significance to a determination by the Army Finance Center to pay an ex-spouse directly when the court based its order on a property division and the couple had been married for at least ten years of the retiree's creditable service. Accordingly, a bankruptcy court could conclude that the ex-spouse was entitled to direct payment, regardless of whether the order purportedly was a property division, if the evidence demonstrated that the payments qualified under the USFSPA definitions of alimony or child support.

The holding of *Bush v. Taylor*[200] poses an additional potential roadblock to a military retiree seeking to have a purported property division involving his or her retired pay discharged by a bankruptcy court. In *Bush* the ex-wife conceded that the debtor's obligation was not for

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[189] *See In re* Spong, 661 F.2d 6, 9 (2d Cir. 1981) ("The language [of 11 U.S.C. § 523 (a)(5) (1988)] will apply to make nondischargeable *only* alimony, maintenance, or support owed directly to a spouse or dependant. What constitutes alimony, maintenance, or child support will be determined under bankruptcy laws...." (emphasis added) (citation omitted)).

[190] The portion of the USFSPA dealing with division of military disposable retired pay as marital property and the direct payment of disposable military retired pay to satisfy alimony or child support obligations appears at 10 U.S.C. § 1408 (1988).

[191] 10 U.S.C. § 1408(a)(4) (1988).

[192] *Id.* § 1408(c)(1).

[193] *Id.* § 1408(d)(1).

[194] *Id.* § 1408(d)(2).

[195] *See* 11 U.S.C. § 523(a)(5) (1988). In at least one reported case not involving application of the USFSPA, however, a court concluded that the parties' divorce decree, which characterized monthly payments as support, was not controlling when the evidence was clear and convincing that the payments served as part of a property settlement. *See* Schmerzler v. Goodnight, 15 Fam. L. Rep. (BNA) 1504 (D. Kan. 1989).

[196] 10 U.S.C. § 1408(a)(2)(B)(i) defines child support in accordance with 42 U.S.C. § 662(b) (1988) as follows:

> The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

[197] 10 U.S.C. § 1408(a)(2)(B)(ii) (1988) defines alimony in accordance with 42 U.S.C. § 662(c) (1988) as follows:

> The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

[198] Unless the direct payment is for child support or alimony, the USFSPA prohibits direct payment of a disposable retired pay to an ex-spouse unless the marriage had overlapped with ten years of the retiree's retirement creditable service. *See supra* notes 193, 194 and accompanying text. Presumably, a bankruptcy court would pay deference to a service's determination that direct payment was authorized when a ten year overlap did not exist, thus establishing conclusively that the order was for alimony or child support and not dischargeable.

[199] *See supra* notes 196, 197.

[200] *See* Bush v. Taylor, 912 F.2d. 989 (8th Cir. 1990).

alimony, child support, or maintenance. Notwithstanding the Bankruptcy Code's broad definition of "debt,"[201] the Eighth Circuit, in an en banc decision, held that "not until the 15th of each month when a payment was due but unpaid did that portion of the debtor's obligation become a debt."[202] The court effectively concluded that one debt did not accrue, but, instead, a number of mini-debts accrued on the fifteenth of each month. The court apparently justified that conclusion by noting its "doubt that Congress ever intended that an ex-wife's judicially decreed sole and separate property interests in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start."[203]

A retiree will not be able to use bankruptcy to avoid paying an ex-spouse part of his or her retired pay if the obligation owed is in the nature of alimony, child support, or maintenance. Notwithstanding the holding of *Bush*, bankruptcy may excuse a retiree from paying an ex-spouse a portion of his or her retired pay if the obligation arises from a property settlement. Attorneys should be wary of counseling clients to use bankruptcy as a means of defeating court-ordered divisions of retired pay as property.[204] Most importantly, clients who are contemplating divorce should understand the potential impact of the Bankruptcy Code on payments of military retired pay before deciding whether to seek, or agree to pay, retired pay as part of property division or as alimony, maintenance, or child support. CPT Connor.

Operational Law Note

Proceedings of the First Center for Law and Military Operations Symposium 18-20 April 1990

Opening and Welcoming Remarks

The Center for Law and Military Operations, The Judge Advocate General's School, United States Army, (TJAGSA) held the First Center for Law and Military Operations Symposium from 18 to 20 April 1990. Sixty participants, representing the Army, Navy, Marine Corps, Air Force, Coast Guard, Department of Defense (DOD), and Department of State attended the symposium. The following summary provides a brief introduction to the general topics covered during the symposium. Lieutenant Colonel H. Wayne Elliott is the current Director of the Center.

The then-Secretary of the Army, John O. Marsh, Jr., established the Center for Law and Military Operations in December of 1988. The goal of the Center is to examine both current and potential legal issues attendant to military operations through the use of symposia, the publication of professional papers, and the creation of a joint service operational law (OPLAW) library. The Center not only prepares attorneys to deal with operational legal issues as they exist, but also, as a concurrent function, attempts to anticipate future deployments in military operations. Accordingly, the Center seeks to identify, discuss, and implement legal doctrines essential to evolving missions in the field. In his directive to The Judge Advocate General of the Army, Secretary Marsh emphasized the invaluable contribution the Center could make to the development of close professional relationships between United States and allied attorneys in the OPLAW arena.

Colonel Thomas Strassburg, the Commandant of The Judge Advocate General's School, began the First Center for Law and Military Operations Symposium by welcoming the participants. Brigadier General John Fugh, The Assistant Judge Advocate General, delivered the opening remarks. General Fugh stressed the increasing importance of OPLAW and the role of the newly established Center in "the ongoing examination of legal issues associated with ... the conduct of military operations." General Fugh noted that this role is part of the Center's mission and that this first symposium embarked on the fulfillment of that mission from a joint service perspective.

Operational Law: Service Perspectives on Doctrine, Training, and Materials

The Army Perspective

The first director of the Center, Colonel David E. Graham, began the symposium with a presentation on the Army's perspective of OPLAW. Colonel Graham traced the genesis of OPLAW from the dual experiences of the British in the Falkland Islands War and the United States' Operation Urgent Fury in Grenada. These campaigns focused attention on the need to train legal advisors properly so that they can identify, and can provide timely advice on, the numerous legal issues associated with the deployment of United States forces—both in combat and in peacetime environments. Stressing that OPLAW does not portend an abandonment of traditional judge advo-

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[201] *See supra* note 188.

[202] *Bush*, 912 F.2d at 994.

[203] *See id.* at 995 n.18.

[204] Bankruptcy can make obtaining credit very difficult. Under the Fair Credit Reporting Act, credit reporting agencies can report bankruptcy adjudications on a consumer's credit report for up to ten years. *See* 15 U.S.C. § 1681 (1988).

cate Law of War responsibilities deriving from the Hague and Geneva Conventions, Colonel Graham briefly described the Army's efforts to incorporate the legal lessons learned from past operational deployments into an OPLAW discipline of study.

In the context of deployments, military leaders now commonly recognize that judge advocate responsibilities encompass areas such as claims, contracts, legal assistance, international agreements, diplomatic relations, and criminal law. Accordingly, the International Law Division at The Judge Advocate General's School has developed numerous OPLAW materials, to include the Operational Law Handbook, the OPLAN Review Checklist, and the Deployment Checklist. Additionally, the International Law Division provides OPLAW training and detailed instruction to the Graduate Class at TJAGSA. It also annually conducts two Judge Advocate and Military Operations short courses, three Law of War Workshops, and on-site instruction to reserve judge advocates.

Colonel Graham discussed the Army's working definition of OPLAW: "That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments." He pointed out that the scope of the definition is currently under review so that the Army could consider some of the special concerns of the United States Army Forces Command (FORSCOM), such as the Department of Defense counternarcotics mission.

Colonel Graham next listed and discussed five types of overseas deployments: 1) deployment overseas under a peacetime stationing agreement; 2) deployment for conventional combat missions; 3) deployment for security assistance missions; 4) deployment for overseas exercises; and 5) deployment for unconventional missions. With respect to combat deployments, he noted that commanders increasingly are raising issues concerning applicable international and domestic law, such as the effects of the War Powers Resolution or the Arms Export Control Act. Increased mobility on the part of media representatives in the combat theater requires all commanders to have an understanding of the legal basis for their units' deployments, even though these issues more likely are the concerns of higher levels of command. He noted the importance of recordkeeping in the area of combat contracting and combat claims, particularly with respect to requisitions, appropriations, and seizures of property. Colonel Graham also elaborated on the problems encountered in a post-combat transition to conventional federal contracting rules and the problems arising out of statutorily-imposed limitations on the payment of combat-related claims.

OPLAW issues also arise concerning the criminal law for deploying personnel. For example, judge advocates must understand and be able to apply statutory definitions such as "time of war" and "before the enemy" that affect the application of certain criminal law provisions to an accused.

Colonel Graham then noted that the DOD counternarcotics mission and deployments for security assistance purposes are of increasing interest and require careful interpretation and application of pertinent congressional mandates and restrictions. He then addressed other OPLAW concerns in the context of low intensity conflict environments, pointing out that military exercises will continue to give rise to unique legal issues as long as exercise-related humanitarian assistance, construction, and training continue to supplant underfunded security assistance measures.

Colonel Graham concluded by noting the need for further work in the areas of intelligence law and the legal issues related to civil affairs.

The Navy Perspective

Professor R. J. (Jack) Grunawalt, Captain (Ret.), Director, Oceans Law and Policy Research Department, Center for Naval Warfare Studies, Naval War College, presented the Navy's OPLAW perspective. In his introduction, he stressed the importance of keeping OPLAW in its proper focus. Although OPLAW is not new, addressing OPLAW as a separate area of concern is. Accepting the "bureaucratic necessity" of defining OPLAW, he deemphasized any utility or necessity for arriving at a definition common to all services. From the Navy's perspective, OPLAW encompasses any body of law or policy that is integral to the execution of the operational commander's mission and includes public international law, the law of the sea, the law of space, rules of engagement (ROE), environmental law, and maritime law enforcement. The approach of the Navy is a task approach focused on particular issues, such as freedom of navigation and overflight, and specialized operations, such as counternarcotics missions.

Professor Grunawalt stressed that mission accomplishment is the baseline. The operational lawyer must know the mission from the commander's perspective and understand the nature of the threat the force is confronting. Therefore, viewing the commander as the boss—instead of as the client—is essential. Under this methodology, the lawyer assists in resolving operational problems and does not necessarily provide strictly *legal* advice. Any advice proffered must be timely and, in every possible case, it must precede the contemplated action to be effective. Likewise, counsel must be decisive; "no risk" opinions are of little value. Professor Grunawalt emphasized that, unlike the Army's focus on periodic deployments, the Navy operates in a constantly deployed environment.

With respect to educating and training Navy staff judge advocates (SJAs), Professor Grunawalt noted that

no naval counterpart to the Army's mid-career training of legal officers exists. While a Master of Laws (LL.M.) option in international law is available to some Navy judge advocates, the Navy relies principally on two-week courses at the Naval War College, with the goal of creating an appropriate orientation to OPLAW issues. Primarily, the Navy focuses on on-the-job training.

Training for Navy line officers takes a variety of forms. The Naval Academy, Naval Officer Candidate School, and Navy Reserve Officer Training Corps (NROTC) program provide some rudimentary instruction in international law. Command perspective training through military schools provides additional instruction. The Naval War College also provides some instruction in OPLAW areas and conducts various "courses of opportunity." For example, following the *USS Stark* incident, the Navy developed a three-day course on rules of engagement to enhance the preparedness of operational commanders in the execution of the rules of engagement. The Navy also has incorporated OPLAW issues in ROE exercises and wargaming.

The primary publication in the Navy OPLAW arena is *The Commander's Handbook on the Law of Naval Operations*. This publication is also available in an annotated form to support Navy and Marine Corps judge advocate requirements.

In conclusion, Professor Grunawalt concurred in Colonel Graham's assessment that intelligence law is an important area of concern for future work. Professor Grunawalt also strongly supports the efforts and goals of the Center for Law and Military Operations.

The Marine Corps Perspective

Lieutenant Colonel Terry Kane, Assistant Staff Judge Advocate for Operational Law, Headquarters, United States Marine Corps (USMC), addressed OPLAW from the Marine Corps perspective. Colonel Kane drew a distinction between practicing OPLAW and conducting a military operation. The Marine Corps is organized for combat as a Marine Air Ground Task Force (MAGTF) that, in turn, is organized into Marine Expeditionary Units (MEUs), Battalions (MEBs), and Forces (MEFs). Marines use the sea for basing and for avenues of approach as a bridge to land operations. Colonel Kane indicated that the Marine Corps has three MEFs that can operate from thirteen prepositioned ships with thirty-day sustainability. The MAGTF is subdivided functionally into four elements: 1) a command element; 2) a ground combat element (GCE); 3) an aviation combat element (ACE); and 4) a combat service support element (CSSE). Most Marine Corps lawyers function within a CSSE. An SJA draws upon the legal services support section for legal advice. The Operations Law Branch, Headquarters, Marine Corps, and attorneys at the unified commands deal with OPLAW issues arising outside the MAGTF.

Marine Corps lawyers who have received some training in the area of civil affairs attend to issues arising from civilian-military relations. The Marine Corps conducts formal training in civil affairs, to the extent possible, at Fort Bragg, North Carolina. The Marine Corps also provides OPLAW training through a variety of short courses, such as the USMC Law of War courses. The Marine Corps also avails itself of training available through other services, such as the Army's Law of War and Judge Advocate and Military Operations courses.

The Marine Corps relies upon doctrinal publications of the other services in the OPLAW area, such as *The Commander's Handbook on the Law of Naval Operations*, the Army's Field Manual 27-10, and the Air Force's Publication 110-31. The Marines base their delivery of legal services to deployed commands on Operational Handbook 4-10, Legal Services Support Annex.

The Air Force Perspective

Major Walter Phillips, Chief, International Operations Law, Air Force Judge Advocate General's School, delivered the OPLAW perspective for the Air Force. Major Phillips began his remarks by providing an expansive Air Force definition of OPLAW:

> Domestic and international legal issues associated with the planning and execution of peacetime and combat military operations. This body of law impacts directly upon the capability of the commander and his staff to accomplish the military mission. It includes, but is not limited to, legal issues relating to security assistance, training mobilization, pre-deployment preparation, deployment, overseas procurement, the conduct of military operations, and civil affairs operations in foreign countries.

After discussing this definition, Major Phillips described, in detail, the operational law instruction provided at the Air Force Judge Advocate General's School at Maxwell Air Force Base, Alabama.

The Air Force Judge Advocate Staff Officer Course offers four hours in international operations law. The courses include status of forces agreements, criminal law issues, claims, and operational planning factors. The course also provides two hours of the law of armed conflict. In addition, the school offers an annual one-week course in international operations law and teaches OPLAW topics during Air Force reserve and Air National Guard judge advocate courses. Faculty members also provide instruction on OPLAW to other Air Force schools, to include the Air Command and Staff College, the Air Force Senior NCO Academy, and the Air War College. Finally, the Air Force holds a Contingency Wartime Planning Course ten times each year.

In closing, Major Phillips pointed out the Air Force's concern over the drafting of effective rules of engagement applicable to air operations. He also acknowledged the need for the branches of the armed forces to think jointly in the OPLAW arena.

The Coast Guard Perspective

Commander Michael Perrone, Maritime International Law Division, United States Coast Guard, presented the Coast Guard perspective of OPLAW. Commander Perrone prefaced his comments with a historical commentary on the origin and current status of the Coast Guard. Essentially, the United States Coast Guard functions under the Department of Transportation. Upon declaration of war or presidential directive, however, it operates as an integral part of the Navy. An essential role of the Coast Guard—whether or not it acts as a service in the Navy—is to provide port security. Antiterrorism is a part of this Coast Guard mission. Commander Perrone discussed the various concerns regarding Coast Guard participation in the interdiction of drug traffickers and the need to train fully all Coast Guard personnel.

Other services provide training to Coast Guard personnel in OPLAW, primarily through the Navy's ROE and Operational Law Course. Because the Coast Guard offers no formal OPLAW training, Commander Perrone supported joint legal efforts to address OPLAW concerns.

Commander Perrone emphasized the difference between ROE and traditional use of force considerations, noting that a developing situation may require Coast Guard personnel to shift quickly from one concept to the other. Finally, Commander Perrone stressed the need to transmit OPLAW information to the smaller vessels used in Coast Guard security operations.

Psychological Operations: A Joint Perspective

Colonel Harold W. Youmans, Chief, Policy & Concepts Division, Headquarters, United States Special Operations Command (SOCOM), spoke on the legal considerations regarding psychological operations (PSYOP). After stipulating that PSYOP is a vital part of modern military and political power projections, Colonel Youmans reviewed the constitutional, statutory, treaty, directive, and regulatory authorities surrounding the application of PSYOP.

The President's authority to apply PSYOP derives from his constitutional authority as Commander in Chief and from his responsibility to faithfully execute the laws of the nation. Those laws include titles 10, 32, and 50 of the United States Code, which generally govern the practice of PSYOP. Additionally, statutory provisions controlling the United States Information Agency and the Central Intelligence Agency affect interagency aspects of PSYOP functions. Colonel Youmans further noted that treaties and other international agreements also control how the military applies PSYOP. For instance, the Annex to the Fourth Hague Convention is particularly determinative regarding "ruses of war." He then went on to discuss the effects that the United Nations Charter and the various bilateral and regional defense treaties have on PSYOP. To explain these effects, he offered a case study on how the United States applies PSYOP within the NATO context.

Colonel Youmans pointed out that presidential national security decision directives, executive orders, and interagency agreements also influence how the military employs PSYOP. For instance, within the Department of Defense, the Secretary of Defense fulfills his PSYOP responsibilities by promulgating various DOD directives and a DOD-wide master plan.

Operationally, the Office of the Joint Chiefs of Staff (JCS) has integrated PSYOP planning into the Joint Operations Planning System, the Unified Command Plan, the Joint Strategic Capabilities Plan, and other pertinent service and JCS memoranda. Joint PSYOP doctrine appears in Joint Publication 3-53. Colonel Youmans completed his remarks by briefly discussing the service doctrines and authorities.

To gain the full measure of benefit from the application of PSYOP, Colonel Youmans encouraged the attendees to increase their knowledge of PSYOP. He concluded by noting that a thorough knowledge of PSYOP concepts is crucial to a military attorney's ability to provide current, cogent legal advice to his or her commander.

Operation Just Cause

Lieutenant Colonel Glen Orgeron, USMC, Office of the Staff Judge Advocate, United States Southern Command (SOUTHCOM), provided a briefing on Operation Just Cause. In the context of the history of the Panama Canal, Colonel Orgeron examined the Panama Canal Treaty prohibition against interference in the internal affairs of Panama and provided a brief chronology of events leading up to the United States' combat deployment of December 1989.

Colonel Orgeron next addressed the actions that the United States took in the months preceding Operation Just Cause. These actions included a series of joint training exercises that asserted the United States' authority under the Panama Canal Treaty and the institution of more stringent security measures in the Canal area. A discussion of the Panamanian assault on an off-duty United States military officer and his wife, as well as the murder of First Lieutenant Robert Paz, followed.

The Joint Task Force for Just Cause included over 27,000 soldiers, sailors, airmen, and marines. The composition of the Peoples Defense Force (PDF) was primarily infantry elements that controlled many

Panamanian institutions. The battle plan included the objective of occupying the capital, Panama City. Just before H-hour, the constitutionally-elected Panamanian officials, Endara, Calderone, and Ford, received their oaths of office and assumed the leadership of Panama.

Colonel Orgeron stressed that the commander in chief (CINC) had directed the forces to make concerted efforts to minimize collateral damage. The forces secured all major objectives on D-Day, although sporadic resistance continued thereafter. United States forces considered Panama secured by the end of December 1989. Subsequently, Noriega surrendered on January 4, 1990, after seeking political asylum in the Papal Nunciature.

Colonel Orgeron explained that the stability operations that followed revealed that urgent needs for food, shelter, and medical supplies and assistance existed. To ameliorate the impact created by these needs, the United States dispatched Special Forces "A Teams" to work with the Panamanian populace in rural areas. Colonel Orgeron also noted that during the stability operations, American forces recovered large numbers of weapons from PDF arms caches. He concluded by praising the overall success of the campaign and the minimal damage inflicted on Panamanian property.

Colonel Bill Moorman, United States Air Force (USAF), Staff Judge Advocate, 12th Air Force/Southern Air Force (SOUTHAF), discussed the Air Force's contribution to Operation Just Cause. Colonel Moorman noted the two basic Air Force assumptions in planning for the operation: 1) American forces would use lethal force only as a last resort; and 2) the primary goals were the neutralization of the PDF, the capture of Noriega, the restoration of the legitimate government of Panama, and the protection of American lives.

The Air Force used over three hundred aircraft in the operation, which made it the most complex single air operation, with the longest flight distances, since World War II. The Air Force's objective was to have all forces over targets by 0100 hours local time on 20 December 1989. Colonel Moorman presented the various overflight considerations in the operation and discussed the use of the F-117 stealth fighters in Panama. He also pointed out the unique advantage of having Howard Air Force Base in-country. During the operation, the Air Force lost no aircraft and sustained no casualties.

Colonel Moorman then discussed the manner in which the Air Force developed and approved the ROE for the operation. He noted that SOUTHCOM wrote the basic ROE, SOUTHAF wrote the air ROE, and the JCS then reviewed the ROE. Colonel Moorman then addressed the Air Force's planning for the treatment and disposition of prisoners of war (POWs), refugees, and detainees. He pointed out that SOUTHAF command personnel thoroughly examined the capture and arrest authority of United States forces in the context of the Posse Comitatus Act and the authority of DOD to provide assistance to civil law enforcement authorities—particularly in conjunction with the arrest of narcotics traffickers.

Colonel Moorman also discussed the issues of war trophies, claims, and pillaging. He noted that the Air Force gave careful consideration to each of these issues, but that the magnitude of the problems the Air Force confronted in each of these areas was greater than anticipated. Colonel Moorman stressed the importance of ensuring that each airman had a clear understanding of the command's policy on war trophies, the need to avoid reckless acts that would lead to unnecessary claims, and the fundamental difference between illegal pillaging and the appropriate requisition of private property.

In closing, Colonel Moorman offered some observations concerning the role of the judge advocate as a part of the combat team. He noted that the military attorney must have an understanding of the operation and the planning process, be familiar with the peacetime ROEs, attend planning meetings, and demand full access to operational plans. Finally, the lawyer must be prepared to respond quickly to rapidly evolving events.

Colonel Michael Nye, USAF, Office of the Chairman, Joint Chiefs of Staff, discussed the role of the JCS in Operation Just Cause. Colonel Nye explained that the JCS primarily performed review and support functions while the Unified Command elements prepared and executed the plan. The JCS reviewed plans and ROEs in conjunction with the SOUTHCOM judge advocate. The Chairman of the JCS then briefed the Secretary of Defense (SECDEF), who, in turn, briefed the President.

For operations such as Just Cause, the Office of the JCS sets up a Current Situation Room to monitor developments, to transmit alert warnings, and to execute orders. The Chairman and SECDEF remained in the Current Situation Room to receive reports on the latest developments from the CINC. Throughout the operation, JCS lawyers worked with the State Department, the Justice Department, and the National Security Council. Colonel Nye pointed out that one of the major issues that these parties addressed concerned the question of what actions American forces could take to prevent Noriega's escape from the Papal Nunciature. The JCS finally relied upon the theory of a "public safety" exception to the Vienna Convention on Diplomatic Relations as the basis for searching diplomatic personnel leaving the Nunciature.

Colonel Nye noted that judge advocates staffed the Army Operations Center in the Pentagon twenty-four hours a day. The judge advocate on duty provided valuable assistance to the JCS by responding to the many legal questions that arose during the operation.

Major Gary Walsh, International Law Division, The Judge Advocate General's School, briefed the symposium participants on the After-Action Seminar conducted by the Center for Law and Military Operations following Operation Just Cause. He also discussed a number of the legal issues identified by the seminar participants.

The Center for Law and Military Operations conducted the After-Action Seminar at The Judge Advocate General's School from 26 to 27 February 1990. Most of the principal military and federal civilian attorneys involved in the planning or execution of Just Cause participated. The purpose of the seminar was to discuss the legal issues that arose during the operation with a view toward incorporating the experience gained into future operations planning. The participants addressed the issues in both a chronological and in a functional manner. Accordingly, the seminar categorized the issues as either predeployment or deployment matters and then further divided the issues into functional areas.

Major Walsh first addressed the predeployment issue of operations planning. The seminar participants concluded that the operation successfully integrated judge advocates at all levels into the planning process at an early stage. The role of the judge advocates in Just Cause extended well beyond simply reviewing operations plans. Military attorneys were involved intimately in the review and development of ROEs for Operation Just Cause. Major Walsh pointed out that providing senior officers instruction in operational law has produced dividends in the area of judge advocate involvement in operations planning.

The second predeployment issue discussed was legal assistance for deploying forces. As a result of the aggressive preventive law programs of the units involved, judge advocates needed to prepare relatively few legal documents for the deploying soldiers. Nevertheless, the lack of a quick and easy will-writer computer program hampered last-minute predeployment preparations. Major Walsh commented that The Office of the Judge Advocate General of the Army and The Judge Advocate General's School were working to develop a will format more appropriate for deployments.

Major Walsh then turned to deployment issues. The first deployment issue he addressed was the employment of civil affairs (CA) assets. He noted that CA assets continue to perform critical missions in the rebuilding process in Panama. The military could enhance the employment of these assets substantially if CA doctrine and planning specifically addressed the issue of effectively using CA assets in a post-deployment environment.

Major Walsh also noted that the seminar participants discussed the use of force issue extensively. Several participants stated that the manner in which the military employed force against military objectives and personnel throughout Operation Just Cause was as precise as one could reasonably hope for in a military operation. They attributed the minimal collateral casualties and incidental damage to the following factors: 1) the sophisticated understanding by commanders of legal issues associated with targeting; 2) the involvement of judge advocates in target selection; 3) the ability of commanders to view their objectives prior to the operation; and 4) the discipline, intelligence, and maturity of the soldiers involved in the operation.

Detainee collection and treatment also was a significant deployment issue. American forces extended the protections of the Geneva Convention on Prisoners of War (GPW) to all detainees. The process used to determine the status of these detainees met all the substantive requirements of article 5 of the GPW. Moreover, the United States forces, as early as D-Day, began providing a degree of care to detainees that met both the letter and spirit of the GPW.

Major Walsh noted that the claims system functioned smoothly in Panama primarily because the United States Army South Claims Office (USARSO) was already "on the ground" and had extensive experience in dealing with claims in Panama. The United States Army Claims Service provided valuable assistance to the USARSO Claims Office and to the claims officers in the combat units.

Major Walsh then addressed the issue of acquisition of property, which generated an extensive discussion among the after-action seminar participants. Many of the participants noted that the Department of Defense and the Department of the Army lack established policies that address the critical issue of payment for requisitioned property. These participants urged the military departments to acknowledge the need for legal authority, and to establish clear procedures, to compensate owners of property requisitioned for military purposes during military operations. Major Walsh confirmed that the Department of the Army recognizes the problem and is seeking to resolve it.

The issue of treatment of diplomatic personnel also arose during the deployment. Major Walsh emphasized that close coordination between the Department of State, the United States military, and the United States Embassy was imperative to the proper handling of diplomatic personnel and property. He noted that legal guidance to commanders in the area of diplomatic personnel and property—with respect to searches in particular—must be as specific as possible.

The final deployment issue that Major Walsh discussed concerned the disposition of captured property. Prompt dissemination of an unequivocal command policy on war trophies, coupled with an aggressive inspection

program, effectively precluded the problem of American soldiers taking prohibited items as war trophies.

Europe in Transition

Lieutenant Colonel Keith Sefton, USMC, Office of the Legal Advisor, European Command (EUCOM), began a discussion of the changes taking place in Europe by focusing on combined training exercises conducted in various European nations. Colonel Sefton pointed out that the military has reduced significantly the number and size of exercises taking place, particularly in Germany. He attributed this trend to the perceived reduction in the Soviet threat and the increased emphasis on environmental issues within the host nations. Because of these factors—especially the environmental factor—the United States is looking at alternative training sites. Colonel Sefton said that one alternative that the military is considering is to increase the use of African training sites, which are also within the EUCOM area of responsibility.

Colonel Sefton also discussed the concern of crisis action response with regard to the current political actions and turmoil occurring in Eastern Europe. EUCOM is studying this issue, because political unrest could have a significant impact on stability throughout Europe.

Finally, Colonel Sefton advised that EUCOM is becoming increasingly active in the counternarcotics area. He closed by stating that, because security assistance was on the upswing in Africa, attorneys must be prepared to address the attendant legal issues.

Mr. George Bahamonde, Special Assistant to the Judge Advocate, United States Army Europe (USAREUR), addressed the symposium on the issue of German unification. Mr. Bahamonde indicated that German unification, the apparent demise of communism, and reductions in the military forces of the North Atlantic Treaty Organization (NATO) and the Warsaw Pact were producing short-term instability throughout Europe.

Mr. Bahamonde then specifically addressed reunification by setting forth two basic approaches for the merger of East and West Germany. First, he posited the "takeover theory," noting that article 23 of Germany's Basic Law allows any part of what is now the German Democratic Republic (GDR) to apply for inclusion in the Federal Republic of Germany. Second, Mr. Bahamonde offered the "merger theory," pointing out that article 146 of the Basic Law, which provides for enacting a new constitution and electing a new legislature, essentially facilitates the creation of a new nation.

Because the merger theory would create complex issues—not the least of which would be problems of state succession to treaty obligations—Mr. Bahamonde felt that the takeover theory probably would prevail. Under the takeover theory, Chancellor Kohl would: 1) obtain an agreement with the GDR on economic and legal unification; 2) get approval for a unification plan in the "2+4" talks, which would include leaders from the two Germanies and from the four World War II occupying powers; and 3) get approval for unification from the thirty-five-nation Conference on Security and Cooperation in Europe.

Mr. Bahamonde indicated that American troop reductions coming with German unification may result in various costs to the United States, such as the cancellation or termination of support and service contracts, the discharge of local national employees, and the filing of environmental claims. Unification also would terminate the Allied Forces' occupation rights and would remove the basis for the United States' military presence under present agreements. Mr. Bahamonde asserted that numerous treaties would lapse if the nations involved viewed unification as the final World War II peace settlement.

Speaking on status of forces issues, Mr. Bahamonde noted that the Germans are calling for revisions to the German Supplementary Agreement—a document they always have regarded as allowing too many prerogatives to the Sending States. He predicted that changing the Supplementary Agreement would be a central issue in the context of unification.

In closing, Mr. Bahamonde discussed financial concerns from both the perspective of the Soviet Union and the United States. He stated that Congress desired a substantial peace dividend and expected the Germans to assume a larger share of the financial costs for any remaining American forces. From the Soviet view, Mr. Bahamonde indicated that, because the GDR has been paying virtually all of the costs for the Soviet troop presence in East Germany, the Soviets may pressure a united Germany to pay a large share of the costs associated with the maintenance of Soviet forces in the eastern portion of that country.

Colonel Philip Meek, USAF, Deputy Staff Judge Advocate, United States Forces, Europe, discussed the perspectives of various European nations on the presence of American forces. He focused his comments on the perceived reduction of the Soviet threat, and compared the United States' presence in Europe to its use of military forces stationed in non-European countries such as the Philippines and Panama. Colonel Meek asserted that the changes in Europe will cause the leaders of many nations to review the level of the American presence in their countries and to evaluate the scope of United States operational rights. He also examined the evolving situation in Germany and concluded that a conservative political sentiment seemed to be emerging. Colonel Meek also led a detailed discussion on the destabilizing nature of ethnic problems, as well as the rising nationalism, throughout the Soviet Union and Eastern Europe.

Colonel Meek concluded his remarks by examining the issue of base rights agreements in the context of a changing Europe. He noted that the United States-Spain Agreement on Defense Cooperation, which has some disadvantageous provisions from the American military perspective, may influence negotiations between the United States and other allies, such as Turkey and Greece.

The Department of Defense Counternarcotics Mission: Past, Present, and Future

Major Wallace Warriner, USMC, Deputy Legal and Legislative Counsel to the Chairman, Joint Chiefs of Staff, addressed the symposium on the DOD counternarcotics (CN) mission. He briefly described the political and legislative history of the growing role of DOD in countering drug trafficking. Major Warriner then outlined the current congressional mandate for DOD's involvement in CN operations. The Fiscal Year (FY) 1989 National Defense Authorization Act designated DOD as the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs. This act also directed the SECDEF to integrate the command, control, communication, and technical intelligence assets that the United States has dedicated to interdiction of illegal drugs and to provide support to law enforcement agencies in their CN missions. The FY 1990 DOD Authorization Act permits the SECDEF to accord a wide range of support to federal agencies.

Major Warriner then summarized the SECDEF's guidance for implementation of the assigned mission. He noted that the SECDEF has declared that DOD will attack the flow of illegal drugs at every phase: in the countries that are the sources of the drugs; in transit from the source countries to the United States; and at distribution points in the United States. He illustrated DOD's involvement in CN with examples of interdiction operations being conducted by the United States Atlantic Command (LANTCOM) off the Florida coast and by FORSCOM on the Southwest border.

Major Warriner next discussed the type of support that DOD may provide to United States law enforcement agencies and foreign governments. Examples of support to United States law enforcement agencies include the loaning and maintaining of communications and surveillance equipment, the training of personnel, the transportation of personnel to facilitate a CN operation, and the sharing of intelligence on narcotics traffickers. Support for foreign governments could be in the form of mobile training teams and other security assistance programs that may assist a foreign government in developing its own CN capability.

Finally, Major Warriner discussed the use of force instructions provided to military personnel who support law enforcement agencies. Federal statutes—particularly the Posse Comitatus Act—prohibit American military personnel from participating directly in searches, seizures, arrests, and other similar law enforcement activities. Military personnel may, however, use force in self-defense.

Major James A. McAtamney, International Affairs Division, Office of The Judge Advocate General of the Army, spoke on the fiscal law considerations of DOD CN operations. He indicated that support to law enforcement agencies is reimbursable to DOD under the Economy Act and other applicable laws unless the armed forces provide the support in the course of regular military operations or training, or unless the support results in a benefit to the participating military unit that is substantially equivalent to the benefit it would accrue from normal military operations or training. Major McAtamney also discussed some of the specific DOD missions funded by the FY 1990 DOD Appropriations Act. That act identified a broad range of support that DOD may provide on a nonreimbursable basis. The Foreign Assistance and Arms Export Control Acts, however, would govern DOD support to foreign governments. Major McAtamney pointed out that the International Narcotics Control Program, which is part of the Foreign Assistance Act, also authorized DOD to provide assistance in international CN activities.

Major McAtamney concluded by stating that the federal government must continue to give attention to the funding of DOD CN activities. Many statutory provisions—particularly in the security assistance programs—require reports to Congress, either before or after DOD renders assistance. Consequently, DOD also must pay special attention to proper accounting.

Lieutenant Colonel Thomas Bryant, Office of the Staff Judge Advocate, FORSCOM, elaborated on one of the issues facing the military forces that are providing assistance to law enforcement agents on the Southwest border. He pointed out that much of the property along the border is privately owned. Therefore, while the United States Customs and Border Patrol agents have statutory authority to enter private property to enforce immigration and other laws, military personnel who accompany these agents do not share this authority. Colonel Bryant discussed some of the possible solutions to this problem, such as cross-designation of military personnel as Border Patrol agents, and the FORSCOM proposal of having military personnel accompany Customs agents onto private lands.

The Negotiation and Conclusion of International Agreements

Mr. George Taft, Office of the Legal Advisor, Department of State, spoke on the subject of "Treaties and Other International Agreements: The View from the Fifth Floor of the State Department." Mr. Taft indicated that

State Department Circular 175 is the key document relevant to the authorization to negotiate and conclude international agreements and is applicable when the United States concludes a government-to-government agreement or an agency-to-agency agreement. The purpose of Circular 175 is to ensure that negotiating parties address the foreign policy implications of agreements and to facilitate a level of interagency cooperation that promotes a coordinated and coherent foreign policy. Mr. Taft noted, however, that many agencies fail to obtain the authority required by Circular 175 before commencing negotiations. He cited the United States Agreement on the Sparrow Missile as one such unfortunate example. For agency-to-agency agreements involving DOD, the State Department and DOD have a working arrangement in which the agencies follow DOD's negotiating procedures and in which the State Department reviews agreements prior to their closure.

Mr. Taft went on to assert that a key issue in negotiating agreements is the question of whether a binding agreement is actually necessary. Similarly, the question of whether the United States or an agency really is seeking to conclude a binding agreement often arises. Mr. Taft noted that while binding agreements help to ensure compliance by the parties, they are not always necessary and are frequently difficult to obtain. Nevertheless, if, for example, domestic legislation requires a binding obligation, the law will require the parties to complete an acceptable agreement. In addition, Mr. Taft pointed out that the type of agreement the parties use often will dictate whether or not it is binding. For instance, the United Kingdom, Canada, and Australia generally never consider a document entitled "memorandum of understanding" (MOU) to be binding, while in American practice the language contained in an MOU may, nevertheless, indicate that it actually constitutes a binding agreement. Mr. Taft also recommended that negotiating parties should ensure that all agreements make reference to related or superceded agreements.

Mr. Taft then admonished the attendees on several potential problem areas in negotiating agreements. First, he cautioned negotiators not to draft agency-to-agency agreements that purport to obligate the entire United States government. He also noted that final clauses in international agreements often create problems. Specifically, negotiators frequently position them—or actually hide them—throughout the agreement. Instead, negotiators should place provisions addressing entry into force, amendment procedures, dispute settlement, and termination at the end of an agreement. Mr. Taft went on to state that parties should review annexes and side letters to determine if they should be integral parts of the agreement. He indicated that these principles also apply to MOUs. Finally, Mr. Taft noted that every agreement should, if possible, clearly indicate whether annexes or side letters are binding.

Mr. Taft continued by explaining that agencies that negotiate binding agreements, and other agreements of interest to Congress, must report them to Congress under the Case-Zablocki Act within sixty days of their conclusion. He noted, however, that agencies are typically late in reporting about twenty percent of applicable agreements. Mr. Taft then posited the question, "How does an agency determine if an agreement is significant and if it must report the agreement to Congress?" He indicated that no real, express guidelines existed and that past practice and common sense are the best guides. Mr. Taft concluded by urging parties in doubt to seek appropriate authority from higher headquarters to negotiate and conclude international agreements, and then to report the agreements to the State Department after entry into force.

Mr. Paul van Son of the Office of the Secretary of Defense, Foreign Military Rights Affairs (FMRA) office, next addressed the subject of international agreements from a DOD perspective. Mr. van Son noted that his office presently employs three civilian attorneys and one military judge advocate. It serves as the principal point of contact with the State Department on international agreements relating to military facilities, access and operating rights, and status of forces matters. As appropriate, FMRA exercises a similar coordinating role regarding other international agreements affecting DOD.

Expressing the view that no substitute exists for knowing the law, Mr. van Son stressed that attorneys dealing with international agreements should understand thoroughly Department of Defense Directive 5530.3, which implements the Case-Zablocki Act. In addition to the Department of Defense Directive, each branch of service has promulgated implementing regulations. For instance, Army Regulation 550-51, which the Army currently is revising, implements the Army's policies respecting the Case-Zablocki Act. Mr. van Son then addressed four essential elements of Department of Defense Directive 5530.3:

1) Do not negotiate or conclude an international agreement, of which the Case-Zablocki Act requires reporting, without consulting with the Legal Advisor's office at the Department of State.

2) Do not negotiate or conclude any international agreement having *policy significance*, whether or not it is reportable under the Case-Zablocki Act, without first checking with Under Secretary of Defense (Policy) (USD(P)). The general responsibility for coordinating *policy significant* agreements in the Department of Defense vests with USD(P) and the coordination itself occurs at the Deputy Assistant Secretary level. From the perspective of USD(P), agreements with *policy significance* include agreements that directly and significantly would affect foreign defense relations, agreements that would create security commit-

ments, agreements that normally require approval at OSD or the diplomatic level, and agreements pertaining to technology sharing.

3) Do not negotiate or conclude agreements containing status of United States forces provisions, or access and base rights provisions, without coordinating with FMRA.

4) If a would-be negotiator has any doubt about the reporting requirements for a particular agreement, do not proceed with negotiations.

Mr. van Son went on to discuss status of forces agreements (SOFAs) and pointed out that they are politically significant because they involve government-to-government issues. Accordingly, he noted that the State Department concludes SOFAs at the diplomatic level. Mr. van Son commented that during military deployments, defining the status of DOD personnel frequently presents a problem because the State Department often cannot negotiate, conclude, and confer status for personnel who deploy for less than thirty days. Accordingly, individuals on immediate, short-term deployments usually are subject to host country jurisdiction. In addition, the nature of the "status" that a host country will confer to deploying military personnel often becomes a contentious point. Mr. van Son noted, in particular, that many foreign governments are reluctant to accord military personnel the same status as embassy administrative staff, technical staff, and DOD personnel. He also stated that although SOFA-type agreements, concluded on an agency-to-agency basis, may be helpful to deploying units, host nation courts may not uphold these agreements unless the governments involved concluded them at the diplomatic level. The problems that typify short-term deployments, therefore, emphasize the need to prepare for exercises and security assistance missions as early as possible. Units always should notify, and coordinate with, FMRA to resolve status issues as early as possible.

Mr. van Son acknowledged that, quite possibly, too many DOD agreements exist. Parties involved in negotiations should consider whether a binding agreement is really necessary. Often, understandings or statements of principles, understood not to be binding, may be sufficient. Mr. van Son suggested that if a party needs authority to enter a binding agreement, the party should seek to initiate the request for authority at the component command level, and to have the request forwarded, through the unified command, to USD(P). In conclusion, Mr. van Son indicated that agency negotiating parties should contact FMRA if they have any doubts about whether negotiating authority is necessary. He also emphasized that FMRA was a central repository for all SOFA and basing agreements.

Colonel Raymond Ruppert, Staff Judge Advocate, United States Central Command (USCENTCOM), briefed the symposium on USCENTCOM's perspective on the international agreement process. Colonel Ruppert prefaced his remarks with a detailed explanation of the USCENTCOM area of responsibility and pointed out that cultural and political conditions make the negotiation of binding international agreements difficult. The primary concerns of the command are security assistance (which international agreements do not affect), access rights for exercises, and prepositioning of material. As a unified command, coordination with JCS is crucial for the authority both to negotiate and to conclude international agreements.

Colonel Ruppert pointed out that in the USCENTCOM area, most agreements are politically significant; thus, the Secretary of Defense has not delegated the authority to negotiate and conclude those agreements to the USCENTCOM CINC. Under Department of Defense Directive 5530.3, the Secretary of Defense has delegated to the Chairman of the JCS the authority to negotiate and conclude international agreements except those involving predominantly uniservice matters, security assistance, the collection and exchange of military intelligence, cooperative research and development, mapping, communications security (COMSEC) technology and signals intelligence, and military and industrial security. In turn, the Chairman has redelegated to the individual CINCs the authority to negotiate and conclude international agreements concerning matters other than COMSEC, access to defense communications systems, JCS telecommunications and command communications equipment, and military satellite communications. Colonel Ruppert noted that a confusing area that still requires clarification is the definition of "predominantly uniservice matter."

Colonel Ruppert then discussed his perceptions of the procedure for requesting DOD authority to negotiate or conclude an international agreement. He noted that USCENTCOM directs requests to USD(P) and FMRA, or, if the negotiations do not involve matters of political significance, USCENTCOM will direct the request to the DOD component having the delegated authority to conclude the agreement. This request should include a draft text, a legal memo, a fiscal memo, and a technology risk assessment.

Finally, Colonel Ruppert noted that the State Department's reluctance to negotiate status rights for United States personnel deploying overseas for less than thirty days causes problems for USCENTCOM. For example, in 1989, the Ethiopian Government allowed American military forces to conduct an extensive search and rescue operation in Ethiopia for a missing United States aircraft that contained, among other passengers, a congressman. Although the American military presence involved a significant number of aircraft and United States military personnel, the countries did not negotiate and conclude any agreements. Thus, during the course of the ordered

deployment, the American military forces in Ethiopia were subject to the full civil and criminal jurisdiction of the host nation.

Captain Manuel Supervielle, Office of the Staff Judge Advocate, United States Western Command (WESTCOM), briefed the attendees on the negotiation of international agreements in the United States Pacific Command (USPACOM). Captain Supervielle noted that the primary mission of WESTCOM is to conduct training and to maintain access to countries in the region in support of the USPACOM peacetime strategy. He then discussed WESTCOM's Expanded Relations Program and stressed that low intensity conflict concerns remained high on the command's mission agenda.

Captain Supervielle addressed the types of activities requiring international agreements. He placed these activities into four categories. First, and most common, are combined training exercises in foreign countries. The JCS directs most combined training exercises and uses Operation and Maintenance (O&M) monies to fund them. Second, the various exchange programs, such as the Long Term Personnel Exchange Program (PEP), the Short Term Pacific Armies Look Exchange (PALEX), and small unit exchanges, may require various forms of international agreements. The final two categories Captain Supervielle mentioned were the Pacific Armies Management Seminar (PAMS) and the various Special Forces training exercises conducted in foreign countries. Captain Supervielle remarked that the military conducts most of its Special Forces operations without the benefit of negotiated agreements.

Captain Supervielle then illustrated how serious problems can arise when the military forces do not negotiate agreements by relating an incident that recently occurred in Thailand. In that incident, United States ships were unable to offload exercise supplies because of Thailand's insistence that the American forces must satisfy local customs requirements. On the opposite extreme, Captain Supervielle indicated that sometimes military parties will enter into agreements without having a real concern for their enforceability or binding effect. These parties often conclude agreements simply to expedite and simplify procedures for fulfilling a particular operational mission.

Captain Supervielle next discussed the specific authority of WESTCOM to negotiate agreements, the method of securing proper authority if an agreement does not exist, and the coordination process involved in the negotiating process. If WESTCOM cannot rely on pre-existing authority, it rarely seeks to negotiate an agreement. He then noted the role that the judge advocate must exercise in face-to-face negotiations by relating several instances in which he personally had negotiated and drafted various international agreements.

In conclusion, Captain Supervielle spoke to the full range of judge advocate responsibilities concerning international agreements. These responsibilities include reviewing draft agreements, writing agreements, negotiating through intermediaries, negotiating directly, reporting and safekeeping agreements, and providing advice on the entire exercise planning process. He particularly noted the importance of attending all planning conferences, even if the judge advocate is not involved directly in the negotiation of agreements.

Closing Remarks

Colonel David Graham closed the Symposium by noting that, though no joint definition of OPLAW currently exists, the Symposium had served as an excellent forum for extensively discussing the ways in which the various services deal with OPLAW matters. Stressing the importance of viewing OPLAW from a joint perspective, he thanked the attendees for their participation, acknowledged the receipt of various OPLAW materials provided to the CLAMO library, and requested that the attendees continue to assist in the development of the Center as a primary source of joint OPLAW materials. Major Jeffrey F. Addicott.

Claims Report

United States Army Claims Service

Claims Note

Streamlining Recovery Operations Between Claims and Contracting

USARCS Note: Any claims office that would like one of its claims attorneys appointed as an administrative contracting officer and can obtain approval from the local contracting authority should contact USARCS, ATTN: JACS-PC (Mr. Frezza) to effect coordination PRIOR to implementing the procedure described in this note.

In October 1987, the United States Army Contracting Command, Europe (USACCE) appointed an administrative contracting officer (ACO) to the United States Army Claims Service, Europe (USACSEUR). The purpose of the appointment was to render final decisions on contrac-

tor liability for claims arising under local drayage and packing and crating contracts.[1] The ACO appointment was, therefore, tailored by a limited warrant.[2] The problems that had led to the appointment of the ACO, and the objectives sought in making the appointment, were discussed in an earlier issue of *The Army Lawyer*.[3] When that article was written, the ACO appointment had been in effect for less than three months of a six-month test period. There was no assurance that USACCE would extend the limited warrant in time or expand it to other Regional Contracting Offices (RCO).[4] Now, however, after 286 final decisions involving 2,113 claims, the impact of USACCE's initiative can be assessed more fully. Other Army claims jurisdictions, particularly at major CONUS installations, may find that a similar program would streamline both claims and contracting operations.

Streamlining the Process

When claims arising under contracts cannot be settled voluntarily between the claims office and the contractor, then the Federal Acquisition Regulation (FAR) and paragraph 11-37c of Army Regulation 27-20 require that a request for offset be forwarded to the ACO responsible for the administration of the contract under which the liability was incurred. This action requires forwarding a complete copy of the file, with a transmittal letter setting forth the attempts made to collect from the contractor, and any factual or legal precedents to rebut the contractor's denial. The ACO then conducts an independent review and determines whether offset is warranted.

Streamlining the collection process by making a claims attorney an ACO begins by identifying what problems exist in having a dual-agency responsibility for the same mission. Timeliness is one issue. Transferring the action necessarily protracts settlement efforts. For instance, contractors are advised on the DD Form 1843, Demand on Carrier/Contractor, that a response is required within 120 days or offset action will be initiated without further action. The impact of this advisement, however, is lost when the claims office cannot take the offset. Contractors are aware that the action must be transferred to an ACO for a final decision. Some choose to wait-out the final decision because it effectively represents an interest-free loan for the length of time that claims remain unsettled. Under the Contract Disputes Act and the FAR, interest will not accrue against the contractor's indebtedness until thirty days after the date of the final decision, which may take months to issue.[5]

Furthermore, transportation claims have a low dollar value, are highly repetitive, and can drain organizational resources to process. Within contracting channels, directing priorities at high-cost contracts with command visibility is not unusual. Contracting officers often are required to obtain technical and legal advice to render final decisions on complex matters. They may be reluctant, however, to render final decisions on issues concerning repetitive claims matters that often involve small amounts of money. The fact that the government is the beneficiary of a contractual presumption that places liability on the destination contractor for loss or damage in shipment[6] does not lessen the statutory burden on the contracting officer to render a final decision after an investigation into the facts surrounding the claim. In USAREUR, because of this substantial burden, no argument arose over removing the responsibility from the RCOs.

Impact on Workload

Duplication of effort and cost reduction are also an issue in streamlining the system. Inherent in this dual-agency responsibility is the fact that claims personnel must perform functions merely to transfer actions to another agency. After the actions are transferred, contract personnel perform functions similar to those previously performed by claims personnel, such as logging, filing, evaluating, corresponding, and negotiating. Demonstrating direct cost savings by eliminating these transfer func-

[1] The appointment of the ACO to USACSEUR did not require another personnel position. The appointment was made to the attorney-advisor who prepared the request for offset on each claim. Though the appointment entails greater responsibility, it does not create a greater workload. Instead of *requesting* the offset, he *makes* the offset.

[2] The parameters of the limited warrant are defined in the Certificate of Appointment issued by USACCE:

> Your appointment is subject further to limitations contained in the DOD FAR Supplement, the Army FAR Supplement, the USEUCOM DAR Supplement and the USAREUR Acquisition Instruction. This warrant is for the express purpose of determining contractor liability and issuance of final decisions to authorize collection of claims by administrative offset under intra-city and P&C contracts awarded by U.S. Army Contracting Command Europe contracting offices.

[3] Peluso, *Centralized Recovery Operations in USAREUR*, The Army Lawyer, May 1988, at 56.

[4] The initial ACO appointments were limited to RCOs in Frankfurt and Nuernberg. In April 1988, it was expanded to all United States Army RCOs in West Germany, the Netherlands, Belgium, and Italy from Rome north. In August 1988 it again was expanded to the United States Air Force Contracting Squadron for the Kaiserslautern, Germany, military community. At the same time, the ACO appointment was extended indefinitely.

[5] 41 U.S.C. § 605 (1978); FAR 32.614.

[6] In the absence of evidence of supporting documentation that places liability on a carrier or another contractor, the destination contractor is presumed to be liable for loss or damage of which the contractor is timely notified. *See* Department of State FAR Supp. 52.247-7110.

tions entirely strengthens an initiative to appoint a claims attorney as an ACO. The first step is to document the current work load by personnel positions, equipment usage, and material consumed for both claims and contracting channels. The second step is to determine what functions would be eliminated in both channels and to quantify the work reduction for personnel, equipment, and material. Management yardsticks have been developed that will translate these numbers into dollars saved. Contact your organizational review and analysis office for assistance.

In USAREUR the work reduction was dramatic. USACCE virtually was eliminated from any involvement in carrier recovery. The only remaining responsibility is for the USACCE command counsel to review final decisions for legal sufficiency. This review entails ensuring that the final decision letter to the contractor states all the necessary statutory and regulatory advisements. USACCE does not conduct a factual review of the claims involved in the final decision; that has been done by the ACO at USACSEUR. Consequently, the RCOs have encountered a total elimination of their carrier recovery workload.

When mission consolidation takes place between two commands, typically one command will have to assume a greater workload. With USACCE eliminated from the carrier recovery process, however, USACSEUR actually assumed a lot less work. The ACO appointment eliminated the interface between USACSEUR and fourteen RCOs. Draft factual justifications for each offset request, photocopying the entire claims file, and transmitting the action to the responsible RCO no longer was necessary. An illustration of this work reduction was a final decision involving forty-two claims. Without the ACO limited warrant, that final decision would have entailed forty-two justifications, forty-two transmittals, and approximately 900 pages of photocopying. With the ACO limited warrant, the entire action involved a three-page final decision to the contractor and a one-page transmittal to USACCE.[7]

Streamlining the system gave USACSEUR immediate leverage with industry. Contractors proved much more willing to settle claims voluntarily within the 120-day suspense period. Contractors who previously had not settled any claims now negotiate on a regular basis. Frivolous denials of liability seldom are seen in contractor correspondence. The ability to take offset action also contributed immeasurably to the morale within the organization.

Greater productivity per employee also resulted. Because of the reduced workload made possible by mission consolidation, the United States Army Claims Service transferred responsibility to USACSEUR to process carrier recovery actions for ITGBL unaccompanied baggage shipments from CONUS to Europe in fiscal year 1989. The recovery branch absorbed the workload, consisting of approximately 4,000 files annually, without the need for additional staffing. The CONUS carrier recovery mission could not have been considered—much less accomplished—without the means to take final action on European contractor claims.

Conflict of Interest Concerns

Arguments may be raised by industry, or from within the government, that an ACO appointment to a claims attorney is a conflict of interest; it is not. No conflict of interest exists in the government's finding a more effective means of administering a program. Rather, the issue of concern is whether an individual serving as both a claims attorney and as an ACO acts arbitrarily, capriciously, or unreasonably in rendering final decisions. Such a finding by the Armed Services Board of Contract Appeals would establish that the ACO abused his administrative discretion. This charge, however, can be made on any ACO action that affects contract performance. The fact that an ACO is also a claims attorney does not inherently violate the integrity of the contract.

To address these issues, the claims attorney acting as an ACO must recognize that the standard for contractor liability can be more stringent than for a claims settlement. A claims attorney acting as an ACO must ensure that the applicable standard has been satisfied prior to issuing a final decision. For example, a claim for a television with a cracked transistor board is payable, because the nature of the internal damage is consistent with rough handling. It would not be appropriate for a claims attorney acting as an ACO, however, to hold the contractor liable for this internal damage, absent external damage or clear evidence from a repairman or an eyewitness that the item was dropped or otherwise mishandled.

A claims attorney with an ACO appointment also must recognize that he or she is working for two separate agencies. His or her actions as an ACO are accountable to contracting channels—not to the staff judge advocate. The ACO must exercise his or her independent discretion on all matters pertaining to contractor liability. At the same time, his chain of command must recognize that the ACO appointment is personal to the individual—not to

[7]If a contractor appeals a final decision to the Armed Services Board of Contract Appeals (ASBCA), the ACO appointed to USACSEUR has responsibility to prepare the Rule 4 File for the ASBCA and the trial attorney's litigation file. Three final decisions have been appealed to the ASBCA. All three were dismissed with prejudice without any compromise of the government's action.

the office. Maintaining the integrity of the appointment is critical, because it may be subject to judicial examination in the event of contractor appeal. Mr. Andrew J. Peluso.

Claims Policy Note

Field Claims Office Authority to Compromise, Waive, or Terminate Collection Action on Affirmative Claims

This is a Claims Policy Note that updates and provides additional guidance to the guidance appearing at paragraphs 14-4, 14-10b, and 14-15c of Army Regulation (AR) 27-20; and paragraphs 9-5, 9-6, 9-16e, and 9-32 of Department of the Army (DA) Pamphlet 27-162. In accordance with paragraph 1-9f of AR 27-20, this guidance is binding on all Army claims personnel.

Field claims offices have limited authority to compromise, waive, or terminate collection action on affirmative claims. To facilitate use of the new automated Affirmative Claims Management Program, the Claims Service has redefined the terms "compromise," "waiver," and "termination of collection action." In addition, this note grants field claims offices limited authority to waive medical care claims, and thus creates an exception to paragraph 14-4*b*(2) of AR 27-20. *See also* AR 27-20, para. 1-9*e*.

Definitions

Compromise. To "compromise" an affirmative claim is to accept an amount from the tortfeasor that is less than the amount asserted because of difficulties in effecting collection, as defined by the Federal Claims Collection Standards. *See* 4 C.F.R. chap. 11, part 103. Acceptable bases for compromise include inability of the tortfeasor to pay, probability that the government will be unable to prove its case or collection costs not commensurate with the amount being compromised.

In addition, a medical care claim may be compromised to effect an equitable distribution of funds if collection of the government's entire claim will result in undue hardship to the injured party. Factors to consider in determining this are listed in paragraph 9-6c, DA Pamphlet 27-162. Note, however, that a compromise due to undue hardship is not appropriate unless the Recovery Judge Advocate (RJA) is provided with detailed information on the funds available, the reasonable value of the injured party's claim, benefits accruing to the injured party, future medical expenses, and the assets of the injured party and persons dependent on him or her. *See* AR 27-20, para. 14-15*c*(3)(c). The RJA may consider an offer by the injured party's attorney to waive a portion of his or her fee but should not specifically request such a waiver.

Waiver. To "waive" is to close a medical care claim without any recovery because the available funds are insufficient both to satisfy the government's claim and to compensate an injured party fairly. A waiver is only appropriate if collection of any part of the government's claim will result in undue hardship to the injured party. Property damage claims cannot be waived.

Termination of Collection Action. To terminate collection action is to close an affirmative claim without any recovery because of difficulties in effecting collection, as defined by the Federal Claims Collection Standards. *See* 4 C.F.R. chap. 11, part 104.3. Acceptable bases for termination of a collection action include lack of legal merit to the claim, lack of evidence to substantiate the claim, costs of recovery that will exceed the amount recoverable, or inability to locate the debtor in instances in which the likelihood of collection is too remote to justify retention of the file.

Medical Care Claims

While a field claims office always may collect the full amount asserted on a medical care claim, a field claims office has limits on its authority to compromise, waive, or terminate action on a medical care recovery claim.

If a medical care claim is asserted for more than $25,000, a field claims office *may not* compromise, waive, or terminate collection action on that claim without approval from the Affirmative Claims Branch at USARCS. USARCS, in turn, is required to obtain authority from the Department of Justice to approve any compromise, waiver, or termination on a claim when the amount asserted is in excess of $40,000.

For medical care claims asserted for $25,000 or less, *area claims offices* may compromise up to $15,000 of the amount asserted without contacting the Affirmative Claims Branch, USARCS. Area claims offices also may waive completely or terminate collection actions on medical care claims asserted for $15,000 or less without USARCS approval. To waive, compromise, or terminate collection action for more than $15,000, an area claims office must contact USARCS.

For medical care claims asserted for $25,000 or less, *claims processing offices* with approval authority may be delegated authority by their respective area claims offices to compromise up to $5,000 of the amount asserted without contacting their area claims office or USARCS. Claims processing offices also may waive completely or terminate collection actions on medical care claims asserted for $5,000 or less without area claims office or USARCS approval. To waive, compromise, or terminate collection action for more than $5,000, a claims processing office must contact its area claims office—if the amount is within that office's jurisdiction—or USARCS for greater amounts.

The above field claims office authority is recapitulated in Table 1.

Property Damage Claims

Because there is no injured party to satisfy, a property damage claim cannot be "waived." While a field claims office always can collect the full amount asserted on a property damage claim, a field claims office also has limits on its authority to compromise or terminate a collection action on a property damage claim.

If a property damage claim is asserted for more than $20,000, a field claims office *may not* compromise or terminate collection action on that claim without approval from the Affirmative Claims Branch at USARCS. USARCS, in turn, is required to obtain authority from the Department of Justice to approve any compromise or termination.

For property damage claims asserted for $20,000 or less, *area claims offices* may compromise up to $10,000 of the amount asserted. Area claims offices also may terminate collection action on claims asserted for $10,000 or less without contacting USARCS. To compromise or terminate action for more than $10,000, an area claims office must contact USARCS.

For property damage claims asserted for $20,000 or less, *claims processing offices* with approval authority may be delegated authority by their respective area claims offices to compromise up to $5,000 of the amount asserted. Claims processing offices also may terminate collection actions on claims asserted for $5,000 or less without contacting their area claims office or USARCS. To compromise or terminate a collection action for more than $5,000, a claims processing office must contact its area claims office—if the amount is within that office's jurisdiction—or USARCS for greater amounts.

The above field claims office authority is recapitulated in Table 2.

Table 1

LOCAL MEDICAL CARE WAIVER/COMPROMISE/TERMINATION AUTHORITY

	Amount of Assertion		
	Greater than $25,000	Over $15,000, up to $25,000	No more than $15,000
Area Claims Offices	No authority to terminate, waive, or compromise	May compromise up to $15,000.	May waive, compromise, or terminate.
Claims Processing Offices	No authority to terminate, waive, or compromise	May compromise up to $5,000.	May waive, compromise, or terminate.

Table 2

LOCAL PROPERTY DAMAGE COMPROMISE/TERMINATION AUTHORITY

	Amount of Assertion		
	Greater than $20,000	Over $10,000, up to $20,000	No more than $10,000
Area Claims Offices	No authority to terminate, waive, or compromise	May compromise up to $10,000.	May waive, compromise, or terminate.

	Amount of Assertion		
	Greater than $20,000	Over $5,000, up to $20,000	No more than $5,000
Claims Processing Offices	No authority to terminate, waive, or compromise	May compromise up to $5,000.	May waive, compromise, or terminate.

Personnel Claims Notes

Internal Damage to Computers II

Computers are sensitive and do not last forever. Parts and batteries wear out or develop loose connections; disks and drives develop bad sectors over time. When a computer accumulates enough internal problems, it stops working. If this occurs following a government-sponsored move, the claimant genuinely will *believe* that the computer was damaged by rough handling in transit.

Sometimes internal computer problems following shipment are due to rough handling. Often, however, they are due to inadequate maintenance or defects in computer components. Temperature fluctuations, humidity, static electricity, problems with incoming power, foreign objects inside the computer, and airborne contaminants such as cigarette smoke all affect how a computer will operate. Consequently, a computer that worked at origin may not work after being shipped. Before adjudicating claims for internal damage to computers, claims personnel—and claimants—should be familiar with the problems that plague computers.

A major source of computer problems is the expansion and contraction of components due to changing temperatures. Computers are affected by changes in the outside temperature; they also heat themselves up when they operate and cool down when they are turned off. The

repeated heating and cooling a computer is subjected to creates problems. The main areas where problems develop are the memory boards, the hard disk drive and controller, and the power supply.

Socketed components in the power supply and on memory boards such as memory chips "creep" as the computer heats and cools when it is turned on and off. These components gradually work their way out of their sockets as the metal around them expands and contracts; this loosens the glue holding the connection together and enables corrosion to work its way into the joint. Ultimately, the connection often fails as a result. Many "blown" power supplies are the result of a solder joint that failed or a transistor that burned out when it became separated from its heat sink because of expansion and contraction. Also, repeated heating and cooling makes the solder brittle, causing it to develop hairline cracks that sometimes simply break when the system is moved. All types of socketed components—particularly components in older televisions—are subject to this type of wear.

Hard disk drives, particularly inexpensive "stepper motor" disk drives, have the same problems with expansion and contraction. Generally, a stepper motor hard drive inevitably will fail. For a hard disk drive to function properly, the "head" must write data to the precise location on the track where the system expects it to be. Stepper motor drives have inherent problems tracking. As the drive expands with changing temperatures, the "heads" of the hard drive no longer write data to the same locations. In addition, only a few stepper motor drives automatically "park" the drive heads when the system is turned off. This increases the likelihood that dust or some other airborne contaminant will damage the head. When enough problems accumulate, the drive ceases to track where data is written and where track and sector identification marks are; the drive then stops working. Indeed, even tightening the screws too much on one of these drives can distort the physical shape and cause the "heads" to write data to the wrong location.

The greatest expansion problems are caused by turning the computer on and off; the quick temperature change causes an incredible amount of stress very suddenly. Marginal components that were not manufactured very well often simply break when the system is turned on. This is especially true when the system has not been turned on for an extended period of time, which causes the computer to cool down more than it usually would. Because computers are not turned on during shipment and are also subject to outside temperature extremes, shipment is often the last straw. When the computer is turned on next, chips stop working and inexpensively manufactured hard drives refuse to "boot." Many computer owners leave their computers on continuously to avoid expansion problems, but obviously this is not a viable option during shipment.

Periodic maintenance reduces the likelihood that problems will occur during shipment. Dirt and debris pulled in by the computer's air flow have to be cleaned out periodically to keep components from failing. Periodically reseating chips is a good idea; the boards, however, normally have to be removed to accomplish this. Periodic low-level reformatting of hard disk drives (*after* backing up the data) is also good preventive maintenance, particularly with stepper motor hard disk drives. Periodic reformatting lays down a new set of track and sector identification marks that better correspond to the physical locations where the "heads" are actually reading and writing the data. Sadly, preventive maintenance is not a cure for every problem, and repairs sometimes are needed.

Repairing a computer often presents as much trouble as repairing a car. Most computer components are intended to be thrown away rather than repaired, and many shops will not take the time and trouble necessary to determine what caused a problem. Further, a shortage of good computer repair personnel exists, and many firms that offer repairs lack expertise. Some of them will replace an entire board or hard drive rather than replace a loose chip or reformat a drive. Like some automobile repair firms, they practice "dart board" diagnosis—that is, they simply replace components until the system works. Advanced diagnostic programs are necessary to isolate errors, but are no substitute for skill; indeed, many diagnostic programs are very poor at identifying disk drive problems.

Hard drive problems are particularly difficult to identify. Very few repair shops can open a hard drive and physically examine it. As a rule, if a hard drive develops major problems that cannot be fixed by reformatting, it is simply discarded without any attempt to determine the nature or cause of the damage. Accordingly, without knowing the cause of the damage, substantiating that damage to a hard drive was incident to rough handling in shipment is difficult.

Claims for internal damage to computers should not be paid unless sufficient evidence exists to conclude that the loss was due to rough handling in shipment. Obviously, when dealing with internal damage to computers, the information a good repair firm provides is essential in determining whether or not a claim is payable. The amount of damage other items in the shipment suffered is also a factor indicating rough handling. The mere fact that the computer worked fine prior to shipment is *not* a sufficient basis to pay a claim.

The precise nature of the damage is critical. As with all internal damage claims, the fact that the repair estimate states "shipment damage" is of no evidentiary value. The repairman should be questioned closely to determine what the damage was and what could have caused it. Cracked or broken boards and components may be

deemed to be the result of rough handling. Conversely, payment should not be allowed when parts work themselves loose and stop functioning or burn out. Some computers, particularly laptops, have their internal components shock mounted to withstand a tremendous amount of "g" force; this is also a factor to consider. In determining whether internal damage to a hard drive is incident to shipment, consider the type of hard drive, whether reformatting was attempted, and whether the drive automatically parks the heads whenever the system is turned off. Most claims for internal damage to hard disk drives will not be payable.

Claims for internal damage to computers create problems. Convincing a claimant whose computer worked prior to shipment that damage was not caused by rough handling in shipment is difficult. Claims judge advocates must exercise care in this area to avoid making improper payments. Claims judge advocates also should note that even with meritorious claims, obsolescence is almost always a factor to consider in determining an appropriate amount of compensation.

Because computer repairs can be expensive, claims judge advocates should practice preventive law by warning soldiers about the claims approach to computer damage. One way to do this would be to publish periodically the bulk of this note in local command information media. Claims personnel also should encourage soldiers with computers to consider alternate methods of transporting them because private insurance companies also will not cover damage when rough handling cannot be substantiated. Advance warning will reduce the number of uncompensated computer claims. Mr. Frezza.

Matching Discontinued China, Crystal, and Silver Patterns and Repairing Expensive Artwork and Porcelain

Individual pieces of china, crystal, and sterling silver from discontinued patterns occasionally are destroyed or lost from shipments. To avoid replacing an entire set, claimants should be directed to firms that can replace individual pieces. Broken figurines, particularly Lladros and Hummels, also present problems in adjudicating claims. A skilled repair firm can join broken pieces and match colors so that there is no hint of a break.

In previous Personnel Claims Notes, the Claims Service has mentioned Replacements, Ltd. (matching china, crystal, and silver); Jacquelyn's China Matching Service (July 1988); Walter Drake China Exchange (November 1988); China Trace (March 1989); and Beverly Bremer Silver Shop (February 1990). USARCS now has published a "USARCS Specialty Replacement and Repair Guide," dated 1 October 1990, that consists of two sections of repair and replacement firms.

Section I, Discontinued China, Crystal, Silver, lists the names and addresses of sixty-four firms that can provide replacements for discontinued sets. Among others, we thank Barbara Erwin and Sharon Harkins of the Fort McPherson claims office, Darlene Dogwood of the TACOM claims office, Helga Haese of the Bamberg claims office, Terry Griffo of the Fort Benjamin Harrison claims office, and Kathie Zink of the Personnel Claims and Recovery Division, for providing information that went into this guide.

Section II, Artwork & Porcelain Repair, lists the names of thirty firms that specialize in repairing expensive porcelain figurines. Some of these firms will restore other types of artwork, such as oil paintings. We thank Eva Matthews of the Fort Rucker claims office for providing the information that went into this guide.

USARCS is interested in continuing to publish the names of firms that specialize in restoring artwork or in matching pieces from discontinued china, crystal, or silver patterns. We encourage anyone who knows of such a firm to write to U.S. Army Claims Service, ATTN: JACS-PC, Fort George G. Meade, MD 20755-5360, and provide us with its name, address, and telephone number. Mr. Frezza.

Depreciating Automobile Paint Jobs

The discussion to "Automobile Paint Jobs" (Item No. 8) in the Allowance List-Depreciation Guide states, "On complete paint jobs, depreciate both labor and material. On minor paint jobs, do not depreciate labor or material." Misinterpreting the import of this language, a few offices are not depreciating a paint job unless every inch of the vehicle is repainted.

At a certain point, a paint job is no longer "minor" and should be considered "complete." A "minor" paint job is not, for example, a repaint of three fenders, the hood, and the trunk; many repair firms would repaint the entire vehicle for substantially the same price. Whether a claims examiner takes depreciation on a paint job should depend on whether the claimant has been enhanced, not whether the repair firm has been creative in preparing the estimate. As a rough rule of thumb, a claims office should consider a paint job complete when more than two-thirds of the vehicle is being repainted.

If the claims examiner does not depreciate a paint job, he or she should consider any preexisting damage (PED). If the areas being repainted have PED, the full cost of repair should be allowed if the PED is minor compared to the new damage. *See* DA Pamphlet 27-162, para. 2-38*b*(3). If, however, the old damage is equal to or greater than the new damage, the examiner should deduct an appropriate amount for PED. *See* DA Pamphlet 27-162, para. 2-38*b*(4).

An inspection is absolutely essential in determining these factors. Obviously, for an examiner to assess whether a paint job is complete, or whether a deduction

for PED is appropriate, is difficult without inspecting the vehicle. Although some claims are mailed in, most claimants physically appear in the claims office. When the claimant first appears to file a vehicle claim, claims personnel should *always* visually inspect the claimant's vehicle and record handwritten notes on its condition. This should be a part of every office's claims reception procedures. *See* DA Pamphlet 27-162, para. 2-29a. These notes should be signed, dated, and filed until the claimant presents a claim. If the vehicle looks as if it may present unusual difficulties, claims personnel should consider taking photographs as well.

In many instances, an inspection will show that damage to an older car is not worth repairing. For example, replacing a lightly damaged bumper would be inappropriate if a vehicle has a significant amount of PED or is nearing the end of its useful life—the appropriate measure for this damage would be a Loss of Value (LOV). *See id.* para. 2-38*a*(1).

While an LOV usually is not appropriate for damage to paint because the exposed surface will rust, an LOV should be considered for minor damage to paint if a vehicle needs repainting badly or already is rusting out. Identifying whether an LOV is appropriate early in the claims process is important. A claimant is far more likely to be satisfied with a small LOV if he or she has not been put to the trouble of obtaining a repair estimate for a much higher amount. In the counselling process, a claimant should not be instructed to get a repair estimate if an LOV is appropriate. Mr. Frezza.

Affirmative Claims Note

FY 1991 OMB Hospital Rates

The Office of Management and Budget (OMB) has established the following hospital rates for use in computing medical care costs for treatment provided in fiscal year (FY) 1991:

Inpatient care — $603 per day
Outpatient care — $71 per visit
Burn Center care — $2,176 per day

These rates are effective for all care provided by military medical facilities after 1 October 1990. CHAMPUS costs are still based on the Diagnosis Related Groups (DRG's) rather than the OMB rates. CPT Dillenseger.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

General

Labor Counselor Computer Bulletin Board Service (BBS) Established

The Labor and Employment Law Office, OTJAG, has established a "Labor Law Conference" as part of the OTJAG computerized bulletin board service (OTJAG BBS) that will allow labor counselors worldwide to communicate with one another instantaneously. The "conference" is simply one segment under the umbrella of the OTJAG BBS.

The purpose of the Labor Law Conference is to optimize interaction between labor counselors and to permit labor counselors to assist each other with research and to share experience. It also provides a convenient method for passing out information and recent developments. Labor counselors will be able to share sample briefs, settlement agreements, last chance agreements, and other documentation through a feature that allows the uploading or downloading of files to the BBS. In addition, the new Labor Law Conference will feature the availability of the "Labor Law Notes" submitted to the editorial board of *The Army Lawyer*.

For those who have not used the ALAP BBS before, step-by-step instructions on how to access it via ENABLE were published in the March 1990 issue of *The Army Lawyer* at pages 56-57. The communications data necessary to set up the software to access the OTJAG BBS also appear monthly in the **Current Material of Interest** section at the end of *The Army Lawyer*. Many contract lawyers already are using this system and will be able to assist labor counselors who would like to access the Labor Law Conference.

The Labor Law BBS coordinator is Mr. Mike Meisel, who may be contacted at Autovon 225-9481 or 9300 for further information. We ask that you try out the system and let us know your thoughts on how it might be more responsive to the needs of individual labor counselors.

Combined Settlement Policy Issued

A tripartite memorandum was published on 19 September 1990, to spell out formally among Army lawyers, civilian personnel officials, and EEO officials, the Army settlement policy in civilian personnel discipline and performances cases and in Equal Employment Opportunity (EEO) cases.

Although all three disciplines individually have had the same settlement policy as an informal measure, the memorandum marks the first effort by representatives of all three functional areas formally to issue a combined uniform policy. The memorandum emphasizes that it is the affected commander or civilian manager who has the ultimate authority and responsibility for settling cases when the Army has taken adverse action against a civilian employee for performance or disciplinary reasons, or when the Army is the subject of a complaint of prohibited discrimination by a particular employee or class of employees.

The memorandum also emphasizes a requirement that the staff judge advocate, represented in settlement matters by the command labor counselor; the civilian personnel officer, represented by the employee relations specialist; and the command equal employment opportunity (EEO) officer coordinate their advice to the commander or civilian supervisor. In addition, the memorandum requires each individual to take into consideration the unique aspects of each discipline in providing effective advice to the affected commander or manager.

The memorandum was signed jointly by representatives of the Headquarters, Department of the Army (HQDA) Civilian Personnel Directorate, the HQDA EEO Compliance and Complaints Review Agency and the Office of The Judge Advocate General. It was distributed through respective legal, civilian personnel, and EEO technical channels.

Labor Law

Building Security

The Federal Labor Relations Authority (FLRA or Authority) decided a negotiability appeal addressing a number of union proposals submitted during bargaining over implementing a security program at certain Environmental Protection Agency (EPA) Washington area facilities.

One proposal was to require the agency to ensure that employees at EPA Headquarters would receive the same level of protection as that provided to employees at its Arlington, Virginia, facility. The Authority agreed with EPA that the proposal directly interfered with management's right to determine its internal security practices because it precluded the agency from instituting security measures at its headquarters—which provided a different level of protection than other EPA facilities—regardless of whether it considered those measures to be appropriate.

The fact that the criterion limiting management's discretion was a general one did not prevent the resulting substantive limitation on management's rights. The proposal did, however, constitute a negotiable appropriate arrangement. The FLRA did "not believe that management's interest in being able to keep things as they are outweighs the interest of employees in better protection of their security in the workplace." Management maintained discretion regarding which measures to employ to maintain the same level of security at the different locations. The proposal did not interfere excessively with EPA's right to determine its internal security practices.

Another proposal was to require EPA to "provide for protection from bullets, other projectiles, exploding or other incendiary devices and other dangerous objects including automobiles from entering the work space ...." The FLRA ruled that the agency's decision concerning which threats it would protect agency employees from was an integral aspect of its determination of internal security practices. In the absence of a union argument that the proposal was an appropriate arrangement, the Authority concluded that the proposal was nonnegotiable.

A third proposal was to require EPA to notify the union of listed "serious incidents" such as lost weapons, lost keys, unsecured doors, and guards working without weapons certification. The Authority recognized that the notification language did not require EPA to take any particular action in response to these incidents. The Authority, therefore, ruled it to be a negotiable procedure under section 7106(b)(2).

A fourth proposal was language requiring management to begin an "aggressive campaign to prevent theft of personal property." The FLRA determined that this language did not interfere with EPA's right to determine its internal security practices. The FLRA reasoned that an agency's right to determine how to protect its own property derives from its right to direct its internal security practices. Protecting employees' personal property, however, is related to employees' working conditions rather than to management's internal security practices. The FLRA, therefore, determined the proposal to be negotiable.

Proposals to test loudspeakers at least semiannually, to test fire alarms as required by law, and to repair those alarms only on weekends were found negotiable. However, a proposal that courier packages be left at the guard desk rather than be delivered to the recipient employee, to prevent the entry of dangerous people, was found nonnegotiable by FLRA. The FLRA said that this proposal would have required EPA to adopt a particular practice to safeguard its personnel and would have interfered with EPA's section 7106 right to determine its internal security practices. *NFFE and EPA*, 36 FLRA 618 (1990).

Dues Withholding

In ruling on the negotiability appeal of several proposals made by the union representing workers at the

Naval Coastal Systems Center in Panama City, Florida, the FLRA considered a union proposal that the union would not be responsible for any errors committed by management in the dues withholding program. The Authority rejected the union argument that *Lowry A.F.B.*, 31 FLRA 793 (1988), was controlling. In *Lowry A.F.B.* the FLRA had ruled that an agency may not reduce the amount of dues remitted to a union to collect on a claim for an earlier erroneous overpayment of dues. The Authority also rejected the union argument that the union intended its proposal only to have the effect of the proposal that the FLRA ruled negotiable in *Lowry*. The FLRA found the language's "broad wording" to be inconsistent with the union's narrow interpretation. The Authority interpreted the proposal to require the agency to waive all claims against the union arising from overpayment of dues. By statute and regulation, only the Comptroller General may waive claims for overpayments of amounts over $500. The proposal, therefore, was nonnegotiable as inconsistent with statute and government-wide regulation. *NFFE and Naval Coastal Systems Center, Panama City, FL*, 36 FLRA 725 (1990).

ULP Postings

The General Counsel filed an exception to the recommended decision of an administrative law judge (ALJ) resulting from a complaint charging an unfair labor practice (ULP) in violation of section 7116(a). The ALJ found that a violation did occur and ordered that the activity "Commander, or a designee" sign a posted notice to all activity employees. The General Counsel argued that the commander, and not a designee, was the only proper party to sign the posting. The FLRA agreed. It reasoned that the remedial purposes of the notice necessitated that the commander sign it. Accordingly, the Authority modified the judge's order to require that the notice be signed by the depot commander. *Naval Aviation Depot, Naval Air Station Alameda, Alameda, CA and IAM*, 36 FLRA 705 (1990).

NAF Pay and Benefits

The FLRA has ruled that benefits for Air Force Nonappropriated Fund (NAF) employees are negotiable conditions of employment. The Authority reviewed a proposal that would require the Air Force to assume the cost of an increase in health benefit premiums. NAF employees' wages are not set by statute. Accordingly, FLRA applied the ruling in *Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043 (1990), that pay and fringe benefits are conditions of employment when they are not provided for specifically by federal statute.

The Authority also rejected the Air Force argument that the proposal would limit its right to determine its budget. The agency did not show that the proposal would require it to establish particular programs or prescribe the amount to be allocated in the budget for those programs. In addition, the Air Force failed to show that the proposal would lead to increased costs that are significant, unavoidable, and not offset by compensating benefits. *AFGE and Air Logistics Center, Sacramento*, 36 FLRA 894 (1990).

Appropriate Arrangements

The FLRA has revised its approach in determining whether a proposal that otherwise directly interferes with a management right constitutes a negotiable appropriate arrangement under section 7106(b)(3) for employees adversely affected by the exercise of that right. In *NFFE and Naval Facilities Engineering Command, Western Division*, 36 FLRA 834 (1990), the Authority considered the negotiability of several proposals. One would require the Navy to make a "diligent effort" to assign work consistent with medical limitations on an employee returning to duty from illness or injury. In *NAS, Oceana*, 30 FLRA 1105 (1988), the FLRA had ruled that a similar proposal—though tied to medical restrictions imposed by the agency's own physician—was a negotiable procedure. It also had stated that language requiring light duty for medical restrictions imposed by other than agency medical staff directly interfered with the right to assign work.

The Authority noted that the language did not propose an appropriate arrangement because it assumed that, if management did assign certain duties to a returning employee, there would be an adverse effect. The potential for an adverse effect, however, did not establish that the proposal was an "arrangement" for "employees adversely affected." The FLRA will continue to follow the *NAS, Oceana* ruling that proposals requiring an agency to observe medical restrictions imposed by its own medical authorities are negotiable procedures. The Authority, however, overruled the *NAS, Oceana* holding that proposals requiring agencies to observe medical restrictions imposed by other than its own medical personnel may not be "appropriate arrangements." It will consider whether a proposal that seeks to eliminate possible adverse effects of the exercise of a management right is an appropriate arrangement.

It will "examine relevant facts and circumstances to measure the impact of management's imposition of, or change in, job requirements to determine whether employees were adversely affected." If the FLRA finds that the language does comprise an "arrangement," it will then determine whether it excessively interferes with management's exercise of one of its rights, using the Authority's traditional analysis. The FLRA found that the proposal in question in *NFFE and Naval Facilities Engineering Command* was a negotiable appropriate arrangement.

Arbitrator Lacks Authority to Conditionally Reverse Suspension

The FLRA reversed an arbitrator's award in a grievance challenging the suspension of a shipyard police officer for carelessly discharging his sidearm. The grievant weighed approximately 270 pounds at the time of the incident and the arbitrator found that "a physically trim and conditioned officer would be less prone to have made such an offense."

The arbitrator's decision was to sustain the grievance "if the [g]rievant los[t] ten percent of his weight and participate[d] in a conditioning program ... during the next six months. If successful, the [g]rievant's file [would] be purged of the discipline for the incident at that time, and he [would] be compensated for the fourteen-day period."

The agency excepted, arguing that the arbitrator had not made the requisite finding under the Back Pay Act that the grievant had suffered an unjustified or unwarranted personnel action directly resulting in a loss of pay. The FLRA agreed.

In addition, the Authority noted that by conditioning the suspension on the grievant's weight, the arbitrator had, in effect, required the agency to establish medical standards for the grievant's position. Because 5 C.F.R. part 339.202 reserves to the Office of Personnel Management (OPM) the authority to establish medical standards for a government-wide occupation, the award was also defective as contrary to a government-wide regulation. *Norfolk Naval Shipyard, Portsmouth, VA and NAGE*, 36 FLRA 304 (1990).

Criticality of Date of Execution of a Collective Bargaining Agreement

Labor counselors should discuss with their labor relations specialist a recent nonprecedential ALJ decision concerning the date of execution of a collective bargaining agreement (CBA). In *Department of the Army, Lexington-Blue Grass Army Depot, and IAM*, 4-CA-80876 (March 12, 1990), 90 FLRR 1-4067, the judge ruled that Army Regulation (AR) 690-700, Chapter 711, paragraph 3-4*b*, did not prevent a contract from being "executed" for purposes of starting the thirty-day period for higher-level review and approval, which is provided for by 5 U.S.C. section 7114(c), if the parties' chief negotiators signed off on the entire agreement.

Chapter 711, paragraph 3-4, of AR 690-700, provides that the activity commander has nondelegable authority to execute locally negotiated agreements. The ground rules for the CBA negotiation, however, did not state that the commander would execute the agreement. Rather, the ground rules required that, after the negotiators had reached final agreement, they will "execute a sign off sheet indicating that agreement has been reached." After execution of the sign off sheet, per the ground rules, the CBA was to go to the union for ratification and then to higher headquarters for review.

By the time the CBA arrived at Army Materiel Command (AMC) headquarters for the required final review, three months had passed since the negotiators had executed the sign off sheet. AMC disapproved a few provisions, and the Depot refused to abide by those sections. The judge found that the Army violated section 7116(a)(5) by its refusal to abide by a valid agreement. Accordingly, this case teaches that labor counselors should work closely with labor relations specialists in establishing ground rules that clearly specify these regulatory requirements.

Names and Home Addresses of Bargaining Unit Employees

The Federal Labor Relations Authority (FLRA) has disregarded the ruling of the District of Columbia Circuit Court of Appeals that the release to unions of names and home addresses of federal employees violates the Privacy Act of 1974. The District of Columbia Circuit, relying on the Supreme Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), had ruled that the release of this information violated the Privacy Act. *FLRA v. Department of the Treasury, Financial Management Service*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990).

In a case involving the Portsmouth Naval Shipyard at Portsmouth, New Hampshire, the FLRA, relying on decisions from the First, Second, Fourth, and Eighth Circuits, found that the Navy had engaged in an unfair labor practice by refusing to provide, upon request of the union, the names and home addresses of bargaining unit employees. Although each of these four circuits issued their decisions prior to *Reporters Committee*, the FLRA found that their rulings were consistent with *Reporters Committee* and not a violation of the Privacy Act. The FLRA reasoned that the release of names and home addresses of bargaining unit employees to unions is consistent with private sector law and was authorized by the Privacy Act's routine use exception. *Department of the Navy, Portsmouth Naval Shipyard and International Federation of Professional and Technical Engineers Local 4*, 37 FLRA No. 39 (1990).

Equal Employment Opportunity Law

New Army Court Reporter MOU Forwarded To EEOC

The Labor and Employment Law Office has redrafted and forwarded to the Equal Employment Opportunity Commission (EEOC) a new memorandum of understanding (MOU) authorizing use of Army court reporters in EEOC hearings. The current MOU expired in May 1990 after a two-year test period. Comments from the field—particularly from overseas locations where contract court reporter firms are scarce—indicated that installation

commanders like the flexibility that the program provides. Previous MOUs have had a one-year duration. The new MOU will be in effect for a two-year period that takes effect on the date it is executed by the EEOC. In addition, the MOU will permit a one-year extension of that period. As in the past, local installations will be asked to provide information on the number of cases handled by Army court reporters.

Proposed Final Rule on Federal Sector Discrimination Complaints Processing, 29 C.F.R. Part 1614

The EEOC Legal Counsel has circulated the proposed final rule on the processing of federal sector EEO complaints, to be codified at 29 C.F.R. part 1614, and to replace current regulations at 29 C.F.R. part 1613. The proposed final rule was issued for final comment among federal agencies on October 12, 1990. It is expected to be published in final form in the *Federal Register* in early 1991 and will be effective upon publication.

Following is a summary of expected changes:

(1) Time for Seeking Counseling. The time period for seeking counseling has been modified. Under Part 1614, an aggrieved individual will have forty-five days from the occurrence of an action or the effective date of a personnel action to seek counseling. Initial contact beyond forty-five days, but within 180 days, of the occurrence of the action or effective date of the personnel action will be permitted when the individual shows either that he or she was not notified of the forty-five-day time limit and was otherwise unaware of it, or that he or she was unaware that the action took place or that it was discriminatory, or that he or she was prevented by circumstances beyond his or her control from contacting a counselor, or that other sufficient reasons exist. Initial contact beyond 180 days will be permitted when waiver, estoppel, or equitable tolling apply—that is, the standard currently applied by the courts to determine if the late filing of a private sector charge should be excused.

(2) Length of Counseling Period. The provision governing the length of the counseling period has also been changed. The basic counseling period continues to be thirty days and it can be extended for up to an additional sixty days upon agreement of the individual being counseled by the agency. The EEOC has added a provision, however, allowing the agency to automatically extend the thirty-day period for an additional sixty days if the agency has an established precomplaint dispute resolution program and the individual agrees to participate in it.

(3) Changes in Appellate Process. Several changes have been made to the proposed appellate process. The notice of final action issued by an agency must include a copy of the EEOC Form 573, Notice of Appeal/Petition. That form will contain a place for the appellant to indicate whether a hearing is requested. If a hearing is requested on a complaint that was not dismissed entirely or in part by the agency, it must be filed directly with the appropriate EEOC field office. In all other cases, the appeal must be filed with the EEOC Office of Review and Appeals (ORA). When ORA receives an appeal, it will review the record and make a determination on any jurisdictional issues. If that determination disposes of the entire appeal, ORA will issue a decision. If the determination reverses the dismissal of a complaint, the complaint will be sent back to the agency for investigation and reissuance of the notice of final action. If the determination does not dispose of the entire appeal, or does not reverse the agency's dismissal of the entire complaint and a hearing is requested, the appeal will be referred to an EEOC field office for assignment to an ALJ, who can request additional information from the parties and who will supervise discovery by the parties before the hearing. The ALJ will issue findings of fact and conclusions of law. If neither party files exceptions to the ALJ's findings and conclusions within sixty days, the findings will become EEOC's final decision. If exceptions are filed, ORA will issue the final decision after considering the exceptions. If the initial determination by ORA of jurisdictional and procedural issues does not dispose of the entire appeal and a hearing was not requested, the EEOC will review the agency file and will decide whether a supplemental investigation is needed. Subsequently, ORA will issue the decision after any necessary supplementation.

(4) Age Discrimination Statute of Limitations. The proposed rule initially published by the EEOC that appeared in the *Federal Register* on October 31, 1989, contained two different statutes of limitations for filing civil actions under the Age Discrimination In Employment Act: a) a thirty-day statute of limitations period from receipt of a notice of final action or final decision on appeal; and b) a two- or three-year statute of limitations period for individual who bypass the administrative process and file a notice of intent to sue with EEOC. The final rule retains the thirty-day period for filing suit after the administrative process but deletes the limitations period for filing suits after giving notice of intent to sue. Because of the lack of case law on the latter limitations period, EEOC has decided not to take a position in the regulation at this time.

(5) Management Directive. The proposed final rule requires agencies to conduct counseling, process complaints, compile an investigative record, and reimburse EEOC for supplemental investigative services in accordance with EEOC management

directives. A single management directive containing instructions on each of these matters, as well as other related matters, was prepared by the EEOC and is being circulated among agencies with the Part 1614 rules.

(6) Memorandum of Understanding for Reimbursable Investigations. The proposed final rule retains the reimbursement provision from the proposed rule. The ability of EEOC to review the agency record and complete investigations when necessary has been determined by EEOC to be a key element of the Part 1614 process. The EEOC has stated that because it currently is not funded for these investigations and will not be funded in the future, reimbursement is absolutely necessary. The EEOC has stated that it does not anticipate a large number of investigations. For example, it has said that there will not be any reimbursable supplemental investigations for cases in which a hearing has been requested, for those cases initially investigated by an agency contractor who is obligated to perform supplemental investigations at no cost, or for those cases that are remanded to the agency. More importantly, according to the EEOC, the number of reimbursable investigations is within the control of the agency. There will not be any reimbursable supplemental investigations if an agency timely and adequately investigates complaints. Only when an agency fails to fulfill its duty to investigate will the EEOC have to perform that function.

Civilian Personnel Law

Arrest Pursuant to Warrant Sufficient to Invoke Crime Provision

The Merit Systems Protection Board (MSPB or Board) granted the OPM's petition for reconsideration of its earlier decision that had reversed an indefinite suspension of the appellant.

The Board had found that the agency improperly had invoked the crime provision, 5 U.S.C. section 7113(b)(1), in imposing an indefinite suspension with a curtailed notice period. Appellant had been arrested pursuant to a warrant issued by a magistrate. The Board had relied on its opinion in *Martin v. Department of the Treasury*, 12 M.S.P.R. 12 (1982), that an arrest standing alone was insufficient to support an indefinite suspension under the crime provision. OPM's petition for review argued that the "reasonable cause" language of section 7113(b)(1) was equivalent to the "probable cause" required for a magistrate to issue an arrest award. MSPB agreed. It found that the probable cause determination by a magistrate who issues an arrest warrant, along with an actual arrest, constitutes "reasonable cause" under section 7113(b)(1). It sustained the agency's suspension action. *Dunnington v. Department of Justice and OPM*, 45 M.S.P.R. 305 (1990).

Evidence of Pre-PIP Performance Admissible in Chapter 43 Proceeding

On the same day that it issued its decision in *Sullivan v. Department of the Navy*, 44 M.S.P.R. 646 (1990) (poor performance after the close of a successful performance improvement period may be used to support chapter 43 action in certain circumstances), MSPB decided a similar issue regarding the revelance of performance prior to the performance improvement period (PIP).

The Board originally had remanded the initial decision to the regional office because the ALJ had considered incidents of appellant's unacceptable performance that had occurred prior to the PIP. OPM intervened, arguing that the Board erroneously had barred the agency from introducing evidence of unacceptable performance that occurred prior to appellant's unsuccessful PIP, but which still occurred within the one-year limitation of 5 U.S.C. section 4303(c)(2)(A).

The MSPB invited amicus briefs on the issue. After considering the briefs submitted, it accepted OPM's position. It ruled that an agency may rely on performance deficiencies occurring at any time prior to the one-year period preceding the notice of proposed action if the agency can demonstrate that the appellant had failed to demonstrate acceptable performance during the PIP or had failed to sustain that acceptable performance after the PIP. The Board recognized that, just because an agency may rely solely on unacceptable performance during a PIP to support a removal or demotion under chapter 43, it does not follow that an agency may not also rely on evidence of pre-PIP poor performance.

The Board acknowledged that in some instances an agency could use the pre-PIP performance to "make a clear and compelling case for its action." It also ruled that, in rating performance during a PIP using numerical standards measuring annual performance, an agency may use prorated standards for the PIP "where reasonable." Nevertheless, an agency still must demonstrate that appellant's performance was unacceptable under the annual standards. The Board remanded the appeal to receive evidence on those issues. *Brown v. Department of Veterans Affairs*, 44 M.S.P.R. 635 (1990).

Agreement to Expunge Records Means "ALL" Records

The MSPB earlier had found the Army to be in noncompliance with a settlement agreement in which the Army had agreed to expunge all reference to appellant's removal from the Army's records. The Board had ordered the Army to expunge the records and furnish evidence of its compliance.

The Army responded by submitting "numerous" certifications from various offices that the records had been expunged, but also stated that it was maintaining copies of the removal record in the Management Employee

Relations Division of the local Civilian Personnel Office and in files related to the appellant's Freedom of Information Act and Privacy Act requests. Appellant also had alleged that the activity legal office maintained a record of the removal, and the Army submission did not contain a certification from that office.

The Board ordered all those records expunged. It also threatened sanctions under 5 U.S.C. section 1204(a)(2) for failure to comply. *Soffer v. Department of the Army*, 44 M.S.P.R. 402 (1990).

MSPB Limits OSC Investigatory Authority

The MSPB ruled on an interlocutory appeal filed by the Office of Special Counsel (OSC) from a ruling by the Board's chief ALJ. OSC had been prosecuting respondent Hathaway before the ALJ for committing a prohibited personnel practice by taking a reprisal action against an employee for making protected disclosures.

During the prosecution of its first complaint, OSC had opened an investigation into other prohibited personnel practices also allegedly committed by Hathaway. OSC had informed Hathaway that he was a subject in the second investigation and had scheduled an interview with him. At the interview, the OSC investigator initially informed Hathaway that the questions put to him in that interview would not be used against him in the other disciplinary action that was pending against him.

During the interview, however, the investigators gave Hathaway conflicting advice on the ultimate use of his testimony, and he refused to answer further questions. OSC then subpoenaed him to appear and answer the remaining questions.

Hathaway, acting *pro se*, filed a "Motion to Suspend the Special Counsel's Abuse of Investigatory Authority In Evidentiary Discovery." The ALJ found that the information sought in the second investigation likely had relevance to the issues in the pending disciplinary action and found that OSC might use its investigation as an alternative to the MSPB's discovery procedures. Accordingly, he ordered OSC to postpone its interview and OSC appealed.

On appeal, the MSPB agreed with the chief ALJ's reasoning. The Board recognized that, despite OSC's broad authority to conduct investigations and issue subpoenas, "the Board may determine the parameters of the subpoena when the subject matter of the subpoena involves a matter brought under the jurisdiction of the board as a result of a complaint filed by the OSC." It reasoned that "considerations of fairness" to Hathaway and the interest of the "orderly conduct of the proceedings before the Board" dictated that the questioning be conducted in accordance with the MSPB discovery regulations. *MSPB Special Counsel v. Hathaway*, 45 M.S.P.R. 328 (1990).

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes advise attorneys in the field of current developments in the areas of environmental law and of changes in the Army's environmental policies. OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage articles and notes from the field for this portion of *The Army Lawyer*. Authors should submit articles by sending them to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Regulatory Note

EPA Promulgates Standards of Performance for New, Modified, and Reconstructed Industrial-Commercial-Institutional Steam Generating Units

The Environmental Protection Agency has promulgated standards of performance for new, modified,[1] and reconstructed small industrial, commercial, and institutional steam generating units.[2] The regulations became effective on 12 September 1990. They apply to steam generating units[3] with design heat input capacities ranging from 2.9 megawatts[4] to 29 megawatts[5] for which construction, modification, or reconstruction commenced after 9 June 1989.[6] These boilers may be found at troop installation steam heating plants and at Army-owned industrial facilities where they may be used for a variety of applications.

Under the new regulations, emissions from small steam generators of particulate matter[7] and sulfur dioxide oxide[8] will be regulated under "best demonstrated technology"[9] standards. EPA expects that the new standards

[1] 42 U.S.C. § 7411(4) (1988) ("'modification' means any physical change in, or change in the method of operation ... which increases the amount of any air pollutant emitted ... or which results in the emission of any air pollutant not previously emitted.").

[2] 55 Fed. Reg. 37674 (1990) (to be codified at 40 C.F.R. part 60).

[3] *See* 55 Fed. Reg. 37684 (1990) (to be codified at 40 C.F.R. § 60.41c) ("Steam generating unit means a device that combusts any fuel and produces steam or heats water or any other heat transfer medium.").

[4] 10 million British Thermal Units (BTUs) per hour.

[5] 100 million BTU per hour.

[6] 55 Fed. Reg. 37683 (1990) (to be codified at 40 C.F.R. § 60.40c).

[7] 50 Fed. Reg. 37685 (1990) (to be codified at 40 C.F.R. § 60.43c).

[8] 50 Fed. Reg. 37684 (1990) (to be codified at 40 C.F.R. § 60.42c).

[9] *See* 42 U.S.C. § 7411 (1988) ("the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non[-]air quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated for that category of sources.").

will increase the initial costs of small steam generators by less than ten percent while cutting sulfur dioxide emissions seventy to eighty percent and particulate emissions eighty to ninety percent by 1993.

Case Notes

Citizen Suits Under Clean Water Act Held Subject to Five-Year Statute of Limitations

The Third Circuit, in *Public Interest Research Group of New Jersey Inc. v. Powell Duffryn Terminals Inc.*,[10] has held that citizen suits under section 5055 of the Clean Water Act[11] are subject to a five-year statute of limitations. The district court found that the defendant had violated its National Pollution Discharge Elimination System permit 386 times over a six-year period. The court also found that the Clean Water Act contained no relevant statute of limitations. It held that substantive federal policy reasons dictated that there could be no statute of limitations applied to Clean Water Act citizen suits.

On appeal, the defendant argued that Clean Water Act citizen suits were governed by the omnibus federal five-year statute of limitations contained in title 28, section 2642, of the United States Code.[12] The plaintiffs, however, maintained that section 510 of the Clean Water Act[13] dictated that New Jersey state law controlled. Because New Jersey had no statute of limitations for similar actions, the plaintiffs argued that the trial court must be affirmed.

The court was not persuaded by the plaintiffs' argument. Instead, it found that section 510 of the Clean Water Act pertained only to effluent limitations and not to matters of state civil procedure. Moreover, the Third Circuit reasoned that citizen suits were essentially adjuncts to government enforcement actions. Consequently, the court held that citizen suits under the Clean Water Act were subject to the five-year statute of limitations applicable to government enforcement actions.

NEPA Challenge to Deactivation of the 2d Armored Division, Fort Hood, Texas

In February 1990, the Secretary of Defense directed that certain unit deactivations and reductions be studied to meet fiscal year 1991 active force limits mandated by Congress. Subsequently, the deactivation of the 2d Armored Division at Fort Hood, Texas, was evaluated by the Army based on an analysis of threat, strategy, doctrine, resources, and warfighting requirements.

To determine potential environmental impacts of the proposed inactivation, an environmental assessment (EA) was prepared by the staff at Fort Hood.[14] The Fort Hood EA analyzed the impacts of the deactivation on socioeconomic and cultural resources as well as on air and water quality, noise, and other land use within a study area consisting of Fort Hood and the communities within a thirty-mile radius. The EA, completed in May 1990, concluded that the impact of the deactivation on the biophysical environment would not be significant. Therefore, an environmental impact statement (EIS) was not required under the National Environmental Policy Act (NEPA)[15] and implementing Department of Defense and Army regulations.[16]

On 8 June 1990, a citizen group called Keep Hood Alive and Kicking, Inc. (KHAKI) and Bell County, Texas, brought an action for injunctive and declaratory relief in the district court, seeking to delay the inactivation of the 2d Armored Division until the Army prepared an EIS.[17] Despite the pending suit, on 13 June 1990, the Secretary of the Army approved the deactivation of the division.

On 15 June 1990, the court converted plaintiffs' request for a preliminary injunction into a trial on the

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[10] 59 U.S.L.W. 2146 (3d Cir. Aug. 20, 1990).

[11] 33 U.S.C. § 1365 (1988).

[12] *See* 28 U.S.C. § 2642 (1988) ("[e]xcept as otherwise provided by Act of Congress, an action ... shall not be entertained unless commenced within five years from the date the claim first accrued ....").

[13] 33 U.S.C. § 1370 (1988):

> [N]othing in this chapter shall preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that ... such State ... may not adopt or enforce any effluent limitation ... which is less stringent ... than the effluent limitations ... under [the Act].

[14] *See* Army Reg. 200-2, Environmental Effects of Army Actions, chap. 5 (23 Dec. 1988) [hereinafter AR 200-2]. Chapter 5 of AR 200-2 outlines the conditions requiring an EA, the components of an EA, and guidance on public involvement. Generally, an EA is prepared to determine the extent of environmental impacts when the proposed action does not qualify for a categorical exclusion under the provisions of Chapter 4 and appendix A of AR 200-2.

[15] The National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970), as amended by Pub. L. No. 94-83, 87 Stat. 424 (1975) (codified at 42 U.S.C. 4321-4370a (1982)).

[16] AR 200-2, para. 3-1c.

[17] Keep Hood Alive and Kicking, Inc. (KHAKI) v. Dep't of the Army, No. 90-166 (W.D. Tex. June 8, 1990).

merits pursuant to Federal Rule of Civil Procedure 65(a)(2). With the threat of a preliminary injunction removed, deactivation of one battalion at Fort Hood was accomplished that same day. This quick reaction was possible because Fort Hood already had prepared detailed deactivation plans in the areas of personnel, operations, and logistics. While this type of pre-decisional planning and preparation are allowed by NEPA, Fort Hood carefully avoided any impermissible actions that would have had adverse environmental impacts or would have limited the choice of reasonable alternatives.

The trial on the merits was held on 5 and 6 July 1990. On 14 August 1990, the court denied the plaintiffs' request for a preliminary and permanent injunction. The court concluded that: 1) the Army's EA had taken a "hard look" at the effects of the planned deactivation; 2) plaintiffs had failed to establish that the inactivation would have a direct impact on the biophysical environment and; 3) the potential effects alleged by the plaintiffs were too speculative to warrant consideration and in any event would not be significant. Therefore, the court held that the Army's decision not to prepare an EIS was reasonable and consistent with NEPA. The court stated, "Decisions regarding the military strength of this country should be made by those who have the expertise in that area and who have been designated that mission. Courts should interfere in such decision-making only when a mandate to Congress has clearly been violated."[18] The plaintiffs have indicated that they will not appeal the decision.

The 2d Armored Division litigation illustrates how to prepare and defend environmental studies. The preparation of the EA for the division deactivation was accomplished by a III Corps and Fort Hood staff team under the direction of the Fort Hood Garrison Commander. The team consisted of several full-time members who were able to coordinate, assemble, and prepare the EA based upon input from numerous sources on Fort Hood and in the surrounding communities. Team continuity and ongoing command leadership produced an EA that was thorough and well-researched. The administrative record, critical to the defense of NEPA litigation, contained the studies, reports, and other documents necessary to support the facts and conclusions presented in the EA.

During the EA process, Fort Hood actively sought the input of the local community. Published announcements, informational meetings, and letters to local business and government leaders fostered a continuing community dialogue that addressed significant issues and alternatives. This process was extremely important for good community relations. It resulted in a thorough EA and caused the Army to address in detail those issues raised in the subsequent litigation.

The 2d Armored Division deactivation was the first of many force structure adjustments to be undertaken through the base closure and realignment program. The favorable judicial decision in the KHAKI litigation, concluding that the Army had complied with NEPA, provides a basis for addressing environmental legal issues that arise in future inactivations and reductions.

[18] *KHAKI*, Memorandum Opinion and Order at 32 (Aug. 14, 1990).

Regimental News From the Desk of the Sergeant Major

Sergeant Major Carlo Roquemore

Court Reporter Training

Quite often I receive phone calls from people in the field regarding the type of training being offered to personnel attending the 71E Course at the Naval Justice School. I hope that this note will answer many questions about what we do at the Naval Justice School and what type of training potential 71E students can expect.

The course of instruction for the Army Court Reporter Course at the Naval Justice School is five weeks long. The first week consists of three days of computer training on the Zenith Z-248 Computer (Word Perfect 5.0 software) and familiarization twice each day of the first week with the stenomask, for a total of ten hour's familiarization. The remaining four weeks of the course are on open microphone court reporting—the primary block of instruction.

On the first day at the Naval Justice School, students are tested for their ability to type forty words per minute on an IBM Selectric III typewriter. The test consists of five minutes of sustained typing and is administered three times each day for the first week, as needed. Because students will be disenrolled if they do not complete the typing test successfully, supervisors of soldiers selected for training should ensure their personnel receive any additional typing practice they may require before they

depart from their home station. The formula for grading the typing test is available by calling the Naval Justice School.

After computer training, typing tests, familiarization with closed microphone recording, and indoctrination are completed, live dictation to the students each day comprises the remaining four weeks of the course. The students receive numerous practice dictations before graded transcripts begin during the third week. The Naval Justice School administers a total of ten graded exercises consisting of the following: 1) one court reporting examination; 2) six verbatim transcripts; 3) two summarized transcripts; and 4) one proofreading exercise. To graduate from the course, students must attain a final course average of at least seventy percent on the ten graded exercises. Students achieving a final course average of ninety percent or higher, and who are in the top twenty percent of the class, graduate with honors. The top Army student, if he or she achieves a final course average of ninety percent or higher, receives the Army Judge Advocate General's Award. The top student in the court reporting course also receives the J. Mikel Hibben Award from the Naval Justice School.

Preparing a record of trial using any method of recording, including open microphone, is not just a matter of typing what was recorded on the tape. Students first must ensure they are getting a good recording and then must take notes throughout the dictation sessions to reflect gestures, times of recesses, and other courtroom occurrences. While transcribing, the students not only must be able to type every word spoken on the tape and to insert reporter's notes for gestures, but also must be able to perform these functions with extreme accuracy. Each script is graded on virtually every keystroke for proper format, spelling, punctuation, numbers rules, standard stock entries, exhibit marking, capitalization, and assembly; proper placement of convening orders, charge sheet, and authentication page; proper prefixes for speakers, stages of examination, and gestures; and words in the script that are either correct on the tape and wrong in the script, or words that are in the script but not on the tape.

Students are provided with a word list containing names and words that do not appear in their dictionary, the Manual for Courts-Martial (Manual), the exhibits for the case, or other reference material. This requires students to research intentionally difficult words in their scripts; nothing is "given" to the student that they otherwise would not have in a real trial. The lengths of graded transcripts range from seven to seventeen pages with varying degrees of difficulty. Errors count from one-half to five points depending on their category of importance. For students to obtain a passing grade of seventy percent, they must develop and use good proofreading skills and pay close attention to detail. The grading system is designed so that if a student possesses and applies a good grasp of English composition, grammar, and spelling, he or she will do well in the course. On the other hand, a student who is lacking in these basic skills will have great difficulty and likely will fail the course.

Similarly, the Naval Justice School cannot include instruction in basic grammar skills in the time frame allowed for the course. A soldier without these skills cannot be expected to produce an accurate record of trial with real witnesses and the medical, legal, and drug terminology common in real trials. Therefore, soldiers selected for training must be proficient in this area upon arrival. Emphasis should be placed on this area during the screening of applicants for the course.

Navy and Coast Guard students in court reporter training have just completed four weeks of intensive paralegal training. Accordingly, it is imperative that Army 71E training selectees get actively involved in an on the job training program with their local staff judge advocate's offices to be competitive with their classmates. Because many selectees for this course do not possess the primary military occupational specialty of 71D, they will find the course extremely demanding. Especially for those personnel, it is absolutely necessary that they have a thorough understanding of convening orders, amending orders, court membership, levels of trial, and charge sheets, and that they be very familiar with the Manual, the punitive articles of the Uniform Code of Military Justice, Army Regulation 27-10, and the 71D/71E Soldier's Manuals. Completion of correspondence courses available from The Judge Advocate General's School is highly recommended. All 71E training selectees, including selectees who possess PMOS 71D should, if at all possible, practice transcribing from backup tapes of prior trials, observe trials, and read or proofread records of trial to become more familiar with legal terminology, marking of exhibits, stages of examination, and general trial procedures, as well as to develop proofreading skills. During their practice transcription, they need not be concerned with format, but should concentrate on putting on the paper the same words that are on the tape. File copies of records of trial for the case can be used for comparison with the trainee's transcript.

A new addition is being built onto the Naval Justice School with an anticipated operational date of January 1991. The addition will include a new court reporting classroom with the most up-to-date electronic training equipment available.

Additional information concerning the course can be obtained from the Army Representative or the Command Master Chief of Naval Justice School at AUTOVON 948-3808 or Commercial (401) 841-3808.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1991 Academic Year On-Site Schedule

The following information updates the 1991 Academic Year Continuing Legal Education (On-Site) Training Schedule published in the November 1990 issue of *The Army Lawyer*:

The St. Louis On-Site previously scheduled for 26-28 October 1990, has been rescheduled for 22-24 February 1991. All other information concerning this On-Site remains the same.

The date of the Seattle On-Site has been changed from 19-20 January 91, to 12-13 January 91. All other information concerning this On-Site remains the same.

Reserve Component Officer Education System

Introduction

The new Army Reserve Component Officer Education System (RC-OES) will significantly change the way officers and service schools plan their professional development activities. Planning will be essential to meet unit and personal training objectives. This note outlines the Army's plan on the Judge Advocate Officer Advanced Course, Combined Arms and Service Staff School (CAS3), and the Command and General Staff Course (CGSC).

Judge Advocate Officer Advanced Course

The Judge Advocate Officer Advanced Course (JAOAC) is designed to provide students with a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps (JAGC) officers. The course is the nonresident version of the Judge Advocate Officer Graduate Course and serves as branch qualification for officers to serve in field grade JAGC positions. Completion of this course is a prerequisite for enrollment in the Combined Arms and Service Staff School.

Currently, JAOAC consists of 358 credit hours that must be completed within five years. There are three, two-week resident phases in military legal subjects that may be substituted for three of the correspondence phases. Completion of JAOAC is a requirement for promotion to major. CAS3, however, currently is not required for reserve officers.

The new RC-OES will limit JAOAC to a correspondence phase of not more than 120 hours and one two-week resident phase. Under the new RC-OES, CAS3 will be required after JAOAC to meet the education requirement for promotion to major.

After 1 October 1991, the former JAOAC phases I, III, and V will not be issued to students. Credit for these phases will be obtained by completing Phase I of CAS3. Officers who have completed any of the JAOAC general military phases prior to this cutoff date will be allowed to continue with the remaining general military subjects through 1 October 1992. Thereafter, if they have not completed the general military subject phases, they will be disenrolled from these phases and required to enroll in CAS3, Phase I. Students who substitute Phase I, CAS3, for the general military subjects of JAOAC, will be able to enroll in Phase II, CAS3, when they have completed JAOAC.

Officers enrolling in JAOAC after 1 October 1992, will be enrolled in the new JAOAC. The first resident phase of the new JAOAC will be taught in June 1993 at The Judge Advocate General's School (TJAGSA). Officers will have two years from date of enrollment to complete the new JAOAC.

Combined Arms and Service Staff School

The Reserve Component Combined Arms and Service Staff School (RC-CAS3) is a two-phase course designed to prepare officers for staff duties through the division level. Completion of the Officer Advanced Course is a prerequisite for this course.

Phase I is 140 hours of correspondence course instruction that provides the background knowledge and skills necessary for entry into Phase II. Phase I must be completed before enrolling in Phase II. The Command and General Staff College School of Corresponding Studies will manage the CAS3 Phase I program.

Phase II is resident instruction taught at USARF schools. This instruction will be taught in two parts: Phase IIA will consist of eight IDT weekends (128 hours); and Phase IIB will be two weeks of ADT instruction. Phase II training consists of scenario-based exercises that emphasize problem analysis, solution development, and staff officer coordination. Exercises involve realistic problems related to training, mobilization, and staff planning for unit deployment and combat operations. The Command and General Staff College will develop a two-week ADT alternative to Phase IIA for officers unable to attend the IDT course. Full implementation of RC-CAS3 will be effective 1 October 1993.

Command and General Staff Course

CGSC will be structured as a two-year course of instruction that will be available by correspondence, USARF school, or a combination of both options. The

course will consist of two independent phases. Phase I will focus on tactical war fighting and cover the skills, knowledges, and attitudes required by majors and lieutenant colonels. Completion of this phase is a requirement for RC promotion to lieutenant colonel. The second year will be Phase II. This phase will focus on the operational level of war. Completion of CGSC, Phase II, is required for promotion to colonel. Phase I will be implemented 1 October 1993, and Phase II on 1 October 1994.

Summary

At this time, the milestones for mandatory promotion education requirements have not been established. The following suggestions, however, may assist officers in establishing a professional development plan. Lieutenants completing JAOBC in 1991 should wait until 1 October 1991, to enroll in the new JAOAC. Captains completing JAOAC should enroll immediately in CAS3. Majors scheduled for promotion before 1994 should complete fifty percent of the old CGSC as soon as possible. Majors scheduled for promotion after 1994, who are not currently enrolled in CGSC, should enroll in CAS3 first and then take the new CGSC. Dr. Mark Foley.

RC-OES MILESTONES

1 OCTOBER 1991:	Officers enrolling in JAOAC will not take common core military Phases I, III, and V.
JUNE 1992:	The last resident phase of the old JAOAC.
1 OCTOBER 1992:	TJAGSA no longer will issue the common core military subjects. Officers who have not completed Phases I, III, and IV will be disenrolled.
1 OCTOBER 1992:	Officers enrolling in JAOAC after this date will receive the new RC JAOAC.
JUNE 1993:	The first new RC JAOAC resident phase will be taught at TJAGSA.
1 OCTOBER 1993:	Effective date of full implementation of RC-CAS3.
1 OCTOBER 1993:	Implementation of Phase I CGSC.
1 OCTOBER 1994:	Implementation of Phase II CGSC.
1 OCTOBER 1994:	Completion of all outstanding old JAOAC sub-courses.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course. 17-28 June: JATT Team Training. 17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses

March 1991

3-8: AAJE, Advanced Evidence, Key West, FL.

3-8: AAJE, Criminal Trial Skills, Key West, FL.

4-8: GWU, Cost Reimbursement Contracting, Washington, D.C.

5-8: ESI, Negotiation Strategies and Techniques, Arlington, VA.

6-7: ESI, Claims and Disputes, Washington, D.C.

7-8: ALIABA, Securities Law for Nonsecurities Lawyers, Scottsdale, AZ.

7-9: ALIABA, Labor Relations and Employment Law for Corporate Counsel & GP, New Orleans, LA.

10-15: AAJE, Fact Finding and Decision Making, San Francisco, CA.

10-15: AAJE, Search and Seizure; Recent U.S. Supreme Court Criminal Procedure Cases; and the Law of Hearsay, San Francisco, CA.

11-13: PLI, Advanced Antitrust Workshop, New Orleans, LA.

14-15: LRP, Pennsylvania Employment Law, Hershey, PA.

14-15: ALIABA, Corporate Mergers and Acquisitions, Park City, UT.

19-22: ESI, ADP/Telecommunications Contracting, Washington, D.C.

19-22: ESI, Contract Pricing, Arlington, VA.

20-21: ESI, Terminations, Arlington, VA.

20-22: ALIABA, Legal Problems of Museum Administration, Los Angeles, CA.

20-22: ALIABA, Pension, Profit-Sharing and Other Deferred Compensation, San Francisco, CA.

26-28: GWU, Source Selection Workshop/ Competitive Proposals, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses appear in the August 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year

Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1990 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211	Contract Law Seminar Problems/JAGS-ADK- 86-1 (65 pgs).
AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS- ADA-85-5 (315 pgs).

AD B116103 Legal Assistance Preventive Law Series/ JAGS-ADA-87-10 (205 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135453 Legal Assistance Real Property Guide/ JAGS-ADA-89-2 (253 pgs).

AD B135492 Legal Assistance Consumer Law Guide/ JAGS-ADA-89-3 (609 pgs).

*AD A226160 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (85 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

*AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

*AD A226159 Model Tax Assistance Program/ JA-275-90 (101 pgs).

*AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

*AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145360 Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B135459 Senior Officers Legal Orientation/ JAGS- ADC-89-2 (225 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

REMINDER: Publications are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 30-21	The Army Field Feeding System	24 Sep 90
AR 690-13	Civilian Intelligence Personnel Management System (CIPMS)—Policies and Procedures	30 Sep 90
CIR 11-87-3	Army Programs, Interim Change 102	25 Sep 90
CIR 11-88-6	Army Programs, Interim Change 101	24 Sep 90
CIR 11-88-7	Army Programs, Interim Change 101	28 Sep 90
CIR 11-90-2	Army Programs	28 Sep 90
CIR 210-90-1	Basic Allowance for Subsistence	10 Aug 90
JFTR	Joint Federal Travel Regulation (Civilian Personnel) Change 300	1 Oct 90
JFTR	Joint Federal Travel Regulation (Uniformed Services) Change 46	1 Oct 90
PAM 27-21	Administrative and Civil Law Handbook	18 Sep 90
PAM 27-153	Contract Law	15 Sep 90
Pam 350-38	Standards in Weapons Training	24 Sep 90
PAM 351-4	Army Formal Schools Catalog	1 Oct 90

3. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. A future issue of *The Army Lawyer* will contain information on programming communications software to work with the OTJAG BBS, as well as information on new publications and materials available through the OTJAG BBS.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) now has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. The AUTOVON phone number at TJAGSA has changed. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. TJAGSA is now part of the FTS 2000 telephone network. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6-plus the three-digit extension you want to reach.

5. Disposition of Army Law Library Materials

The following law library materials will be available from 2nd Armored Division, Fort Hood, Texas, starting immediately, with final distribution by 1 February 1991. Please send all requests for material to: CW2 Mariko Dye, Staff Judge Advocate, 2nd Armored Division, Fort Hood, TX 76546; phone numbers are Com'l (817) 287-4912 or AV 737-7011. Any offices receiving materials from this office should forward a list of the materials to TJAGSA, ATTN: Army Law Library Service, Charlottesville, VA 22903-1781.

Bailey & Rothblatt, Handling Narcotic Cases (updated through 1990).

Corpus Juris Secundum (complete set updated through 1990).

LaFave's Search & Seizure 2nd (complete set updated through 1990).

Martindale-Hubble Law Directory (1989 set).

Military Justice Citations (soft bound updated through 1990).

Texas Forms (complete set updated through 1990).

U.S. Law Week.

U.S.C.A. (complete set updated through 1990).

Vernon's Texas Rules and Statutes (complete set updated through 1990).

Military Justice Reporter (three sets).

Comptroller General Decisions (Official Set).

Court-Martial Reports (2 sets, 1-25 and 26-50 index missing).

Criminal Law Reporter.

Family Law Reporter.

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